Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-183

NO. _____

in the

SUPREME COURT OF THE UNITED STATES

October Term 1985

JAMES E. AMEND ET AL

Petitioners,

v.

H. BRYAN POFF, JR. ET AL

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES E. AMEND
Pro Se
J. D. AMEND
Pro Se

615 Texas Commerce
Bank Building
Amarillo, Texas 79109
(806) 352-7541

QUESTION PRESENTED

Whether the Act of a Member of the Judiciary acting in His Judicial Capacity Whereby He reexamines Facts Tried by a Jury and Overturns the Jury's Verdict Constitutes a Substantial Federal Question Pursuant to the Seventh Amendment to the United States Constitution.

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In The

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October Term 1985

JAMES E. AMEND Et Al

Petitioners

v

H. BRYAN POFF, Et Al

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

James E. Amend and J. D. Amend, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in

this matter.

I

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Texas, Amarillo Division, is not reported and is included herein as Appendix A. The Opinion of the United States Court of Appeals for the Fifth Circuit, is not reported and is included herein as Appendix B.

II

JURISDICITON

The unsigned decision of the Court of Appeals was entered June 3, 1985. Petitioners filed a Notice of Appeal dated June 24, 1985 with the Clerk of the U. S. Court of Appeals for the Fifth Circuit. The jurisdiction of this Court to issue a writ of certiorari in this case is

grounded on 28 U.S.C.S. §1253.

III

STATUTORY PROVISIONS INVOLVED

Under the Bill of Rights, Amendment Seven to the Constitution of the United States provides as follows: "That suits in common law, where value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court in the United States." The Fifth Amendment to the Constitution of the United States provides as follows: "That no person shall be deprived of life, liberty or property without due process of law." The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny any person within its jurisdiciton the equal protection of the laws".

IV

STATEMENT OF THE CASE

Petitioners original complaint was filed, with JURY DEMAND, September 27, 1984. Plaintiffs sought monetary damages; based solely on the act of a member of the judiciary in reexamining facts tried by a jury, and overturning the jury's verdict, contrary to the provisions of the Seventh Amendment to the United States

Constitution, and also for Declaratory Relief; and for Injunctive Relief. Because of the amount of damages asked for by the plaintiffs, it was deemed advisable to establish liability of the other named defendants whose acts had aided and abeted a Trustee in defeating the rights of its beneficiary. The state judges were the only defendants with the capacity to declare a mistrial or otherwise deny the plaintiffs their day in court; their acts not only violated constitutional rights, they also breached fiduciary rights, and by law, all these defendants, a judge, a lawyer, or anyone else dealing with fiduciary ties of a Trustee-Beneficiary relationship has made himself liable to the person whose rights he sought to defeat. AMERICAN SURITY CO. OF NEW YORK V. WAGGONER NATIONAL BANK OF VERNON 83 F.

SUPP. 295. The plaintiffs do not claim that all the acts that breached their fiduciary rights also violated their constitutional rights, however, they do claim that all the very same acts that violated their constitutional rights also breached their fiduciary rights.

The Federal District Court dismissed the cause December 14, 1984 after concluding that there is no legal substance in the Plaintiffs' constitutional claims; and having determined that the federal question claim is wholly insubstantial, the proper course is to dismiss for lack of jurisdiction without reaching the question of whether the complaint states a claim upon which relief can be granted. In so doing the Court stresses that it is not rendering an opinion on the substantiality of

Plaintiffs' pendant state law claims alleging the breach of fiduciary duty in the administration of the trust. Even though the District Court makes no mention of judicial immunity in its opinion, this was the principal defense in all the judges original answers.

January 11, 1985 Plaintiffs filed their Brief for Appellants with the clerk of the United States Court of Appeals, For the Fifth Circuit.

All of the defendants, except three, filed their Briefs For Appellees in due time.

April 3, 1985 Deputy Clerk Susan Vaughn sent out notices to attorneys Haynes & Boone and Jeffrey C. Voiles advising them that the (30) day period for filing appellees brief had expired, however, they were granted an extra (10)

days in which to file.

Defendant David Mattka did not file a brief and defendant Keith Lindmark's brief was not received by the Amends until April 15,1985.

Appellant J. D. Amend finished the Reply Brief for Appellants on or about May 3, 1985. The brief was received May 6, 1985 by Deputy Clerk H. E. Adams, Jr. and returned to the Amends the same date since it was received out of time.

May 16, 1985 J. D. Amend returned the seven copies to the clerk of the Fifth Circuit and suggested that, at least, a copy of the said brief should be made a part of the record. In a couple of weeks all seven copies were returned to Amend. A copy of the brief and the related correspondence is included herein as Appendix C

June 3, 1985 the United States Court of Appeals, Fifth Circuit, entered its judgment in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Whereas the District Court after having determined that the federal question claim is wholly insubstantial, the proper course is to dismiss for lack of jurisdiction, and then stating that the Court stresses that it is not rendering an opinion on the substantiality of Plaintiffs' state law claims; the Appeals Court, on the other hand, affirmed the District Courts' dismissal of the Amends' federal claims as "wholly insubstantial", and also affirmed the District Courts" dismissal of the pendant state law claims; the very same claims which the District Court stresses that it is not even rendering an opinion

on.

June 24, 1985 Appellants James E. Amend and J. D. Amend mailed their "notice of Appeal to the Supreme Court of the United States" to the Clerk of the U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

V

REASONS FOR GRANTING THE WRIT

A

IMMUNITY OF JUDICIAL OFFICERS FROM FIDUCIARY LIABILITY IN THE COMMISSION OF ACTS BY THEM WHICH VIOLATE A TRUST BENEFICIARY'S CONSTITUTIONAL RIGHTS, AND ALSO BREACH HIS FIDUCIARY RIGHTS, IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

In these proceedings, the defendants' attorneys have cited more than eighty cases as authorities in support of their

positions. Not one of these cited cases deals with judicial acts which violate constitutional rights and also breach fiduciary rights. The Amends have been unable to find any such cases, and they believe that the gravity of such violation of constitutional rights and breach of fiduciary rights is expressed by Justice Cordoza while serving upon the New York Court of Appeals, in these apt and widely accepted words:

> "Many forms of conduct permissable in a workday for those acting at arm's length are forbidden by those bound by fiduciary ties. A trustee is held to somewhat stricter than the morals of the marketplace. Not honesty alone, but the punctillio of an honor the most sensitive, is then the standard of behavior, as to this

there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the Courts of equity when petitioned to undermine the erosion.***Only thus has the level of conduct of fiduciarys been kept at a level higher than that trodden by the crowd." (Tex. 459 Southwestern Reporter, 2nd Series)

This is a question which should be duly considered by this Court.

B

THE FEDERAL COURT OF APPEALS HAS AFFIRMED A DECISION WHICH THE U.S. DISTRICT COURT DID NOT MAKE, AND IT HAS ALSO AFFIRMED A DECISION THAT IS INCONSISTENT WITH THE USUAL COURSE OF JUDICIAL PROCEEDINGS PURSUANT TO § 1983 AND ITS PREDECESSOR, § 2 OF THE CIVIL

RIGHTS ACT OF 1866; THESE DEPARTURES AND INCONSISTANCIES ARE SUFFICIENT TO CALL FOR AN EXERCISE OF THIS COURTS POWER OF SUPERVISION.

State District Judge H. Bryan poff, Jr. not only reexamined facts tried by a jury in violating Trust Beneficiary James E. Amend's Constitutional Rights under the Seventh Amendment to the U.S. Constitution, he also violated Amend's constitutional rights under the amendments by denying Amend his day in court. Judge Poff declared a mistrial after reexamining facts tried by a jury and then refused to set a retrial date. The mistrial declaration occured early in 1981 and even though requests have been made for a new trial, the Judge, more than four years later, has made no attempt to hear the matter. Judges Marshall, Blackburn, and

Sheehan have all refused to hear Amend's real property title matters in their proper places of venue; these refusals, all at the request of Defendant R. A. Wilson, the Trustees attorney. In each instance attorney Wilson falsely alleged that the claims were the same as those in Judge Poff's 47th District Court. This constant harassment, carried on under color of state law, by the Trustee and the other defendants who have aided and abeted the said Trustee in defeating the Amends' rights has been going on for more than nine years. The following quote is from the U.S. Supreme Courts SUMMARY of the GLADYS PULLIAM v. ALLEN and JESSE NICHOLSON Case No. 82-14321.

> "Congress enacted § 1983 to provide an independant avenue for protection of federal constitutional rights.

> The remedy was considered necessary because state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights."

The Federal District Court dismissed the Plaintiffs' complaint without permitting them to present their case in court even though all the evidence before the said court indicated that there was adequate support and substance to the claim under 42 uscs 1983, HEATH v. ROSEBUD HOSPITAL DISTRICT (1979 D.C. CAL) 463 F. SUPP.766. The Appeals Court stated: "we accept as true the complaints' factual allegations, but not its legal conclusion." All the facts in the complaint were

undisputed, and they were not for determination. The District Court and the Appeals Court, both made reference in their decisions, to state law claims; the state law claims are all pending in state courts. There are no state law claims in these proceedings. This state law claims in this federal case is pure obfuscation originating with defendant R. A. Wilson, and adopted without supporting evidence by state courts, the Federal District Court, and the U.S. Court of Appeals. No where in these proceedings do any of the defendants or the Courts dispute the Plaintiffs' alleged fact that Judge Poff reexamined facts tried by a jury; that such acts constituted violation of constitutional rights; and that it is a federal question. (28 U.S.C.A. § 1331). The same holds true of the Plaintiffs'

alleged facts concerning all the state judges denying the said Plaintiffs' the due process of law; these too are federal questions. (Trinity Episcopal Corp. v. Romney D.C. N.Y., 387 F. SUPP. 1044, 1084)

C

OBFUSCATION, OR THE ADOPTION OF OBFUSCATORY PLEADINGS, BY A JUDICIAL OFFICER IN A CIVIL RIGHTS SUIT SEEKING COMPENSATORY DAMAGES AND INJUNCTIVE RELIEF IS A VERY SERIOUS AND IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The original complaint was filed by Plaintiffs September 27, 1984 in the U.S. District Court; a suit in which the said Plaintiffs sought monetary damages, based solely on Defendant Judge Poff's denying Plaintiff James E. Amend $609,000.00. This was the amount awarded to Trust

Beneficiary Amend by a jury. After reexamining facts tried by a jury, Judge Poff declared a mistrial.

> "Under the Bill of Rights, Amendment VII provides that suits in common law, where value in controversy shall exceed $20.00 the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States."

In this suit, none of the Judges, nor any of the defendants, dispute the fact that Judge Poff reexamined facts tried by a jury; that the Seventh Amendment provides that no fact tried by a jury shall be otherwise reexamined in any court in the United States; that Judge Poff violated Amend's constitutional rights and also breached his fiduciary rights by

reexamining the facts tried by the jury and declaring a mistrial, and that violation of constitutional rights is a federal question, 28 U.S.C.A. § 1331.

Defendant, attorney R.A. wilson, has employed diversionary tactics by which he attempts to obscure and confuse the real issue by focusing attention on immaterial and sometimes unrelated matters, for the purpose of muddling and distorting the matter at hand; this has been his pattern in the state courts, the U.S. District Courts and the U.S. Court of Appeals. These named courts have all adopted his obfuscatory pleadings, or else they have formulated some of their own. In this suit, Mr. Wilson in discussing Judge Poff's declaring a mistrial, states that Judge Poff resolved some particular problem when he declared a mistrial (this

in fact is an admission that Judge Poff reexamined facts tried by a jury). Whether he resolved a problem or created one, is not material; the fact remains that Judge Poff reexamined facts tried by a jury, which is forbidden by the Seventh Amendment to the United States Constitution. Mr. Wilson has repeatedly alleged that the Plaintiffs' claims and complaints are based on adverse decisions handed down by Texas State Courts, with respect to an ongoing controversy involving the alleged misadministration of a trust. The U.S. District Court and the U.S. Court of Appeals, in their dismissal and affirmation discussion both adopted this same line. It is immaterial whether the trust was properly administered or whether it was mismanaged; it is also immaterial whether the state court Judges

rendered adverse decisions or whether the decisions were favorable, the fact remains that the plaintiffs filed a cause of action in which they alleged that Trust Beneficiary James E. Amend had been denied a $609,000.00 jury verdict finding by Judge Poff's reexamining facts tried by a jury, and then declared a mistrial; an act which violated Amend's constitutional rights and also breached his fiduciary rights. This fact is undisputed, and trust matters pending in state courts have nothing to do with this case whatsoever. If Amend can show that he has been damaged and that his constitutional rights have been violated, facts which are undisputed, he need only to present his grievances to a jury to establish to what extent he has been damaged. This is a matter which this court should exercise its discretion to

review in order that the petitioners can have their day in court to have their grievances heard and fairly adjudged, and not have to be harassed in court for another nine years.

> "In suits seeking compensatory damages and injunctive relief, it is error for the district court to dismiss complaint on pleading without affording petitioner opportunity to present evidence to substantiate his very serious allegations, and pro se pleadings are to be judged with liberality unnecessary for those drafted by skilled counsel". CAMPBELL v. BETO (1972, CA. 5 TEX.). 450 F. 765 2d

VI

THE FEDERAL QUESTION IS SUBSTANTIAL

The Appellants' rights have been

violated pursuant to the provisions of the Fifth, Seventh, and, Fourteenth Amendments to the United States Constitution, set forth herein under III,"STATUTORY PROVISIONS INVOLVED".

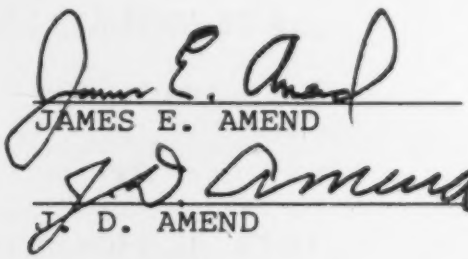
The Judges, the only defendants with the capacity to reexamine facts tried by a jury or to deny a petitioner the due process of law, based their defense in their original answers on judicial immunity, and that the case presented no substantial Federal claim. The GLADYS PULLIAM v. RICHMOND R. ALLEN and JESSE W. NICHOLSON, (No. 82-1432), decision of May 14, 1984 difinitely establishes that judicial immunity is no bar to prospective injunctive relief, and that Congress intended that the federal constitutional rights of individuals be protected and that the courts not be used to harass and

injure citizens of the United States. Rights guaranteed under the Amendments to the United States Constitution are federal matters and no State shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person his day in court. These Amendments speak for themselves; they are not State matters in any sense of the word.

CONCLUSION

Petitioners urge this Court to grant the writ of certiorari; reverse the judgment of the United States Court of Appeals in its entirity, and thereby effect the said petitioners inalienable right to have their grievances heard and fairly adjudged; and put a stop to the continuous harassment which the petitioners have been subjected to since

1976, a period of time in which absolutely nothing has been resolved and has resulted in expenditures exceeding $100,000.00, an amount which the said petitioners could not afford, and which has forced them to represent themselves in court as best they could.



JAMES E. AMEND

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Amarillo, Texas 79109
Tele. (806) 352-7541

CERTIFICATE OF SERVICE

It is certified that on July 31, 1985, a true copy of the foregoing was forwarded to all the attorneys of record, for all the Appellees, at the addresses of record, by U.S. Mail.

J. D. AMEND

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

JAMES E. AMEND, ET AL.,

PLAINTIFFS,

VS.

H. BRYAN POFF, JR., ET AL.,

DEFENDANTS.

CIVIL ACTION NO. CA-2-84-161

ORDER

The Plaintiffs in the above cause allege that the various Defendants have violated the Plaintiffs' Constitutional rights by denying them due process of law. The Plaintiffs' allegations are based upon a series of adverse decisions handed down by Texas

state courts with respect to an ongoing controversy involving the alleged misadministration of a trust. The Plaintiffs include the trustors and beneficiary of the trust. The Defendants include the trustee, several persons who dealt with the trustee in transactions involving trust property, the attorneys for both, and five state district court judges who have presided in various phases of the state litigation.

Plaintiffs' complaint asserts jurisdiction in this Court based upon a federal question. Plaintiffs have not alleged diversity jurisdiction. The complaint further asserts that this Court has pendent jurisdiction over Plaintiffs' state law claims. This Court's jurisdiction is a matter for threshold determination.

Not every claim alleged to arise under federal law is within federal question jurisdiction. The claim must be a "substantial" one. The Supreme Court has recently reviewed this substantiality requirement.

> [T]hat a "substantial" question was necessary to support jurisdiction—was unexceptionable under prior cases. Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within

> their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," [citations omitted]; "wholly insubstantial," [citations omitted]; "obviously frivolous," [citations omitted]; "plainly unsubstantial," [citations omitted]; or "no longer open to discussion," [citations omitted]. One of the principal decisions on the subject, Ex parte Poresky, 54 S.Ct. 3, 4-5 (1933), held, first, that "[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented"; second, that a three-judge court was not necessary to pass upon this initial question of jurisdiction; and third, that "[t]he question, may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decision of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' [citations omitted]."

Hagans v. Lavine, 94 S.Ct. 1372, 1378-79 (1974).

Under the Poresky decision cited by the Hagans Court, even if the Plaintiff's claim is not foreclosed by prior authoritative decisions, the claim still must be more than frivolous to support federal question jurisdiction. To determine substantiality, the Court must ask whether there is any legal substance to the position the Plaintiff is presenting on the federal question. Southpark Square Ltd. v. City of Jackson, Miss., 565 F.2d 338

(5th Cir. 1977). After careful examination of the Plaintiffs' complaint, this Court concludes that there is no legal substance in the Plaintiffs' Constitutional claims. Having determined that the federal question claim is wholly insubstantial, the proper course is to dismiss for lack of jurisdiction without reaching the question of whether the complaint states a claim upon which relief can be granted. Mainelli v. Providence Journal Co., 312 F.2d 3, 6 (1st Cir. 1962).

"In so doing, the Court stresses that it is not rendering an opinion on the substantiality of Plaintiffs' pendent state law claims alleging the breach of fiduciary duty in the administration of the trust. The claim, however, must be pursued in state courts. In order to exercise pendent jurisdiction over a state law claim not otherwise cognizable in federal court, the court must have jurisdiction over a substantial federal claim." Jackson v. Stinchcomb, 635 F.2d 462 (5th Cir. 1981). Where the federal claim is not substantial, that claim cannot support pendent jurisdiction over the state claims. Accordingly, this Court

must dismiss the Plaintiffs' Complaint in its entirety for lack of jurisdiction.

Finally, the Court is also of the opinion that dismissal of this cause would be proper based upon the Defendants' Motions to Dismiss for failure to state a claim upon which federal relief could be granted. Fed.R.Civ.P. 12(b)(6).

In accordance with the above discussion, this Court ORDERS that the above cause be DISMISSED.

ENTERED this 14th day of December, 1984.

/s/ MARY LOU ROBINSON
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

June 3, 1985

MEMORANDUM TO COUNSEL

OR PARTIES LISTED BELOW

No. 85-1018 – Amend vs. Poff

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.

Local Rule 41 provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, this Court's plan under the Criminal Justice Act provides that in the event of affirmance or other decision adverse to the party represented, appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court and shall file such petition if requested to do so in writing by such party. Vouchers claiming compensation and reimbursement of expenses should be filed as promptly as possible and in no event later than sixty (60) days after representation is completed.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/s/ By: Betty G. Martinez
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1018

Summary Calendar

JAMES E. AMEND and J. D. AMEND, Plaintiffs-Appellants,

VS.

H. BRYAN POFF, JR., Judge, 47th District Court of the

State of Texas, ET AL., Defendants-Appellees.

Appeal from the United States District Court for the

Northern District of Texas

(June 3, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

J. D. Amend is the settlor of an inter vivos trust for the benefit of his son, James E. Amend. Over the past few years, the Amends have been embroiled in litigation in the Texas state courts over the alleged misadministration of the trust by its trustee, Amarillo National Bank. After various setbacks in state court, the Amends filed this pro se federal action, alleging deprivations of their due process rights and violations of Texas trust law by the trustee, its attorneys, several entities who dealt with the trustee in transactions involving trust property, their

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published. /i/ DSH 5/18/85, /i/MR 5/20/85, /i/ HAP 5/26/85.

attorneys, and five Texas state judges who have heard different elements of the state litigation. The complaint sought over $791 million in damages, a declaration that the defendants violated the Amends' rights, and an injunction ordering them to stop doing so.

The district court dismissed the Amends' federal claims as "wholly insubstantial" and insufficient to support federal jurisdiction. Lacking a basis for federal jurisdiction, the court dismissed the pendent state claims as well. We affirm.

On this appeal from a jurisdictional dismissal on the face of the complaint, we accept as true the complaint's factual allegations, Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir.), cert. denied, 454 U.S. 897 (1981), but not its legal conclusions. Mescall v. Burrus, 603 F.2d 1266, 1269 (7th Cir. 1979); Blackburn v. Fisk University, 443 F.2d 121, 124 (6th Cir. 1971). The complaint essentially charges the defendants with colluding with the trustee to deprive the trust of property and defeat the Plaintiffs' rights under the trust. The Texas judges' asserted role was the issuance of certain adverse rulings in the Amends' state

lawsuits. In particular, the complaint charges Judge H. Bryan Poff, who presided over the primary state-court action, with pressuring the Amends to accept a settlement offer, barring J. D. Amend from the courtroom during trial, granting a mistrial after a jury awarded the Amends $609,000, and failing to set a retrial date. The complaint then asserts that Amarillo National Bank, its officers, and several attorneys who are defendants here donated money to Judge Poff's campaign fund.

The Amends' challenges to the state judges' adverse rulings are not cognizable federal claims. In this circuit, it is a "well settled rule that a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." Hagerty v. Succession of Clement, 749 F.2d 217, 220 (5th Cir. 1984). Although the complaint could be read as asserting a conspiracy between the judges and the other defendants, see Dennis v. Sparks, 449 U.S. 24 (1980), it alleged no specific facts that might establish such a conspiracy, other

than the adverse rulings themselves.[1] Absent such specific allegations, a charge of judicial collusion does not state a substantial federal claim. See Arseneaux v. Roberts, 726 F.2d 1022 (5th Cir. 1982); Earnest v. Lowentritt, 690 F.2d 1198 (5th Cir. 1982); Phillips v. Mashburn, 746 F.2d 782 (11th Cir. 1984). Finally, it is clear that the nonjudicial defendants' alleged violations of Texas trust law are not constitutional deprivations in the absence of some state-action nexus. Earnest, 690 F.2d at 1200.

Having correctly decided that the Amends' complaint did not allege a substantial federal claim, the district court was also correct in dismissing the pendent state-law claims. Jackson v. Stinchcomb, 635 F.2d 462, 470-471 (5th Cir. 1981); Hagans v. Lavine, 415 U.S. 528 (1974).

AFFIRMED.

---

[1]The campaign contributions to Judge Poff are not evidence of conspiracy sufficient to give rise to a valid federal claim. The Amends make no assertion and cite no facts to show that these donations had any effect on Judge Poff's rulings.

APPENDIX C

J. D. AMEND

615 TEXAS COMMERCE BANK

AMARILLO, TEXAS 79109

MAY 16, 1985

Mr. Gilbert F. Ganucheau, Clerk

UNITED STATES COURT OF APPEALS

Fifth Circuit

600 Camp Street

New Orleans, Louisiana 70130

Re. No. 85-1018; James E. Amend, et al.

v. H. Bryan Poff, Jr., et al

Dear Mr. Ganucheau:

Enclosed are copies of correspondence concerning Reply Brief for Appellants, and also seven copies of the said brief.

You will note that on April 3, 1985 Deputy Clerk, Susan Vaughn, sent out notices to attorneys Haynes & Boone and Jeffrey C. Voiles advising that they had 10 extra days in which to file their briefs. April 10, 1985, William R. Allensworth responded by adopting pleadings of some of the other defendants.

May 6, 1985, Appellants' Reply Brief was received by the Court and that same day Deputy Clerk, H. E. Adams, Jr. returned the seven copies of the said brief to the appellants since it was received out of time.

The April 10 Allensworth letter was not received by this writer until the following Monday, and the appellants relied on the presumption that they would be afforded the same extra time and notice granted to attorneys Allensworth and Voiles in presenting their briefs on behalf of appellees Lindmark and North State Bank. The Amends felt that it was essential that

they read all the appellees' briefs before they attempted to reply.

We are advised by the attorney who has tentatively agreed to handle our appeal, should further action be necessary, that the subject brief should not be essential to the Court's decision, however, he has advised us to return all copies to you so that it will be reflected in the record.

If the briefs are of no use, they need not be returned as we have no need for them at all, however, we think that a copy of our Reply Brief should be made a part of the record.

Very Truly Yours

/s/ J. D. Amend

cc: ATTORNEYS OF RECORD

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

600 CAMP STREET

NEW ORLEANS, LA 70130

Haynes & Boone
Attorneys at Law
4300 InterFirst Two
Dallas, TX 75270

Mr. Jeffrey C. Voiles
Attorney at Law
P. O. Box 2330
910 W. 7th
Amarillo, TX 79105

No. 85-1018 — Amend, et al v. Poff, et al

According to my records, the thirty (30) days period for filing ☐ cross-appellee's ☐ appellee's brief under Rule 31, FRAP has expired.

You are advised as to the necessity of filing your brief for appellee within the next ten (10) days, as otherwise this case

will be taken under submission by the Court upon the record and whatever briefs are on file by that date.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/s/ By: Susan Vaughn

Deputy Clerk

cc: ALL COUNSEL OF RECORD

*As to appellees Lindmark and North State Bank only

HAYNES AND BOONE

ATTORNEYS AND COUNSELORS AT LAW

April 10, 1985

Mr. Gilbert F. Ganucheau, Clerk

UNITED STATES COURT OF APPEALS

Fifth Circuit

600 Camp Street

New Orleans, Louisiana 70130

Re: No. 85-1018; James E. Amend, et al.

v. H. Bryan Poff, Jr., et al.

Dear Mr. Ganucheau:

Appellee KEITH LINDMARK adopts by reference the Briefs of Appellees AMARILLO NATIONAL BANK, JUDGES BLACKBURN, MARSHALL and SHEEHAN, D. BARRY STONE and R. A. WILSON, pursuant to Local Rule 28(i).

Appellee KEITH LINDMARK requests this Court to affirm the judgment of the trial court in its entirety.

HAYNES AND BOONE

/s/ By: David W. Evans

ATTORNEYS FOR APPELLEE

KEITH LINDMARK

cc: ALL COUNSEL OF RECORD

J. D. AMEND

615 Tx Commr. Bnk. Bldg.

Amarillo, Texas 79109

May 4, 1985

United States Court of Appeals

Fifth Circuit

Office of the Clerk

600 Camp Street

New Orleans, LA 70130

Re: No. 85-1018: James E. Amend and

J. D. Amend, Appellants, v. H.

Bryan Poff, et al, Appellees

Gentlemen:

Enclosed for filing are seven copies of "Reply Brief For Appellants" in the above referenced matter.

Copies are being mailed to counsel of record.

Thank you for your assistance.

Very truly yours,

/s/ J. D. Amend

Messrs. James E. Amend

J. D. Amend

Attorneys at Law

615 Texas Commerce Bank Building

Amarillo, TX 79109

No. 85-1018 – JAMES E AMEND, ET AL

-vs- H. BRYAN POFF, JR., ETC., ET AL

(D.C. No. CA-2-84-161)

Dear Counsel:

I am required to return to you herewith, unfiled, your reply brief since it was received out of time.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/s/ By: H. E. Adams, Jr.

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 851018

JAMES E. AMEND ET AL.

APPELLANTS

VS. CIVIL ACTION NO. CA-2-84-161

H. BRYAN POFF, JR. ET AL.

APPELLEES

REPLY BRIEF FOR APPELLANTS

Appeal from the United States District Court

for the Northern District of Texas

Amarillo Division

Hon. Mary Lou Robinson, Presiding

APPELLANTS, PRO SE

JAMES E. AMEND

J. D. AMEND

615 Texas Commerce Bank Building

Amarillo, Texas 79109

(806) 352-7541

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES E. AMEND, ET AL.

Appellants

VS. CIVIL ACTION NO. CA-2-84-161

H. BRYAN POFF, JR. ET AL.

Appellees

CERTIFICATE OF INTERESTED PERSONS

TO THE HONORABLE COURT:

The undersigned appellants of record certify that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Judges of the Court may evaluate possible disqualification or refusal.

LIST

1. James E. Amend and J. D. Amend, Appellants (no attorney).
2. H. Bryan Poff, Jr., Appellee; Attorney — Gary W. Barnhardt, Amarillo, Texas.

3. Naomi Harney, Appellee; Attorney – Gary W. Barnhardt, Amarillo, Texas.

4. Marvin Marshall, Appellee; Attorney – Scott Lyford, Asst. Attorney General, Austin, Texas.

5. J. E. Blackburn, Appellee; Attorney – Scott Lyford, Asst. Attorney General, Austin, Texas.

6. Bill Sheehan, Appellee; Attorney – Scott Lyford, Asst. Attorney General, Austin, Texas.

7. Amarillo National Bank, Appellee; Attorney – R. A. Wilson, Amarillo, Texas.

8. Keith Lindmark, Appellee; Attorney – W. R. Allensworth, Dallas, Texas.

9. David C. Mattka, Appellee; Attorney – W. R. Allensworth, Dallas, Texas.

10. D. Barry Stone, Appellee; Attorney – R. H. Smith, Amarillo, Texas.

11. R. A. Wilson, Appellee; Attorney – R. H. Smith, Amarillo, Texas.

12. Robert L. Templeton, Appellee; Attorney – Oscar Fields, Amarillo, Texas.

13. Gassaway & Gurley, Appellee; Attorney – Jody G. Sheets, Borger, Texas.

14. North State Bank, now BancCentral, Appellee; Dee Miller, Amarillo, Texas.

15. The Prudential Insurance Company of America, Appellee; Attorney – Marvin W. Jones, Amarillo, Texas.

Respectfully Submitted,

/s/ J. D. Amend

/s/ James D. Amend

615 Texas Commerce Bank

Amarillo, Texas 79109

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STATEMENT OF JURISDICTION

The Court has jurisdiction in this appeal under 28 USCS 1291.

STATEMENT OF ISSUES

The Gladys Pulliam V. Richard Allen and Jesse W. Nicholson 1984 U.S. Supreme Court Case, has obviously changed the substance in the pleadings of Appellee Judges Poff, Sheehan, Marshall, Blackburn, and Harney. Judicial immunity, the principal part of their protective claim in their original answers, is hardly mentioned in their appeal briefs. This, plus the fact that all the Appellees' Briefs indicate that the Appellees want to try the case, not on its merits but on technicalities, without making a trip to the courthouse, changes the picture.

Other than the substantiality of the federal question, the principal issue now becomes:

Were the Amends' undisputed allegations of material fact sufficient for them to be permitted to present all their grievances related to the violation of their Constitutional rights in a federal court?

The Amends say that the said undisputed facts which they have submitted are sufficient, and that their cause was incorrectly dismissed.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 851018

JAMES E. AMEND, ET AL.

APPELLANTS

VS. CAUSE NO. CA-2-84-0161

H. BRYAN POFF, JR., ET AL

APPELLEES

REPLY BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

(1) Course of the proceedings and disposition of the Case by District Court, which is the subject of this appeal:

The Amends filed their original complaint September 27, 1984, in which they alledged that their Constitutional rights had been violated and that the very same acts which violated Constitutional rights also breached fiduciary rights. The complaint did not, by any means, include all of the Amends' grievances.

Even though the Amends complaint was filed with JURY DEMAND, the case did not go to trial to a jury; it was dismissed December 14, 1984 on the grounds that the Court: "Having determined that the federal question is wholly insubstantial, the proper course is to dismiss for lack of jurisdiction without reaching the question of whether the complaint states a claim upon which relief can be granted."

January 11, 1985 Plaintiffs filed NOTICE OF APPEAL with the clerk of the U.S. District Court, Northern District of Texas.

BRIEF FOR APPELLANTS, James E. Amend and J. D. Amend, dated February 25, 1985 was filed with the Clerk of the United States Court of Appeals, Fifth Circuit.

BRIEFS FOR APPELLEES, with the exception of Defendant, David C. Mattka, have been filed with the Clerk of the Court of Appeals.

(2) STATEMENT OF FACTS

For the reason that this is a matter of the appeal of a dismissal ORDER and JUDGMENT by Federal District Court

Judge Mary Lou Robinson, which the Amends say was incorrect because the law and the undisputed facts of material evidence do not support the said dismissal, only matters material to the appeal will be presented in this "Appellant's Reply Brief", however, the Amends will briefly address all the Appellees' Briefs, and following the ARGUMENT, a discussion of the matter will be presented. The Amends do not believe that, in an appeal, it is appropriate to attempt to try a lawsuit, therefore, the discussion is partly for the purpose of setting the record straight. Some of the Appellees have distorted their pleadings to such an extent that the said pleadings are misleading and false, and in many instances they are purely obfuscatory. The facts, stated as such, are true and correct in the discussion as they are in all of the Amends' pleadings.

GENERAL FACTS MATERIAL TO DISMISSAL

The word PURPOSE, as defined by Black: "That to which one sets before him to accomplish; an end, intention, or aim, object, plan, project.", is a key word in this presentation for the reason that the undisputed facts, by inference, determine the

intent of the appellees.

(1) Rights guaranteed under the Amendments to the Constitution of the United States is a federal question.

(2) Denying a person his day in court is a violation of his Constitutional Rights.

(3) The employment of any means, be they legal or illegal, for an unlawful purpose implies the existence of fraud, and the employment of a law for such purpose is contrary to the purpose for which the said law was conceived and enacted; laws are enacted to assist or promote justice; they are not to deny or defeat justice.

(4) Dismissing this case, if the judgment stands, will deny the Amends their day in court.

(5) The Appellees have all requested this Court to affirm Judge Robinson's dismissal; the purpose being to deny the Amends their day in court.

(6) The Appellee attorneys have all alleged that they have done no wrong; that their acts were all in the interest of defending their clients; they do not say what their purpose was.

(7) There is neither legitimate defense, nor is there reasonable justification, for the commission of acts, or by other means, for the accomplishment of an unlawful purpose which violates Constitutional rights and also breaches fiduciary rights; any attempt to defend or justify such wanton misconduct can only reopen an incurable wound and add to the extent of the injury.

(8) None of the Defendants, who by their own acts have made themselves constructive trustees and, by law, are liable to the Trust Beneficiary, have disputed or denied such liability.

(9) The Amends filed this suit in the U.S. District Court for the purpose of having the said court determine whether or not their Constitutional rights had been violated, to what extent.

(10) The Defendants, now appellees, all filed answers requesting the Court to dismiss; the purpose being to keep the Amends out of court and prevent them from having their greivances heard, which in fact, would deny them their "day in court."

(11) The Appellees' lawyers have filed Briefs in which

they made allegations, cited laws, rules of civil procedure, and other authority, all for the purpose of keeping the Amends out of court; this they have done in this appeal as they did in the U.S. District Court and in the state courts; they have consistently committed these acts for the purpose of preventing the Amends from having their complaint heard, by just keeping them out of court.

(12) Attorneys, in representing the Appellees, have presented to this court, opinions as facts, and have made obfuscatory statements, in addition to resorting to other means, some mentioned herein, all for the purpose for which attorney R. A. Wilson made his pleas and motions in the state courts.

(13) These Appellees attempt to tell this Court that they have not done the very things that they are still doing.

(14) The Appellees are employing the only effective defense there is for committing acts for the unlawful purpose of violating the Amends' Constitutional rights, the same acts also breaching fiduciary rights, and that is to prevent the greivances from being heard in court.

(15) None of the Defendants have disputed the fact that the Seventh Amendment to the Constitution of the United States forbids any court of the United States to reexamine any fact tried by a jury; none of the Defendants dispute the fact that Judge Poff reexamined several facts tried by a jury and then overturned the jury's verdict by declaring a mistrial; that the reexamination of the facts by Poff ultimately denied the Trust Beneficiary his day in court and also breached his fiduciary rights.

(16) The Defendants are prone to make general and vague denials of violating the Amends' rights, however, none of them dispute the alleged facts of material evidence which affirm the said transgressions.

JUDGE MARY LOU ROBINSON

Although Judge Robinson is not a party to the suit, her dismissal is the subject of the appeal and the following facts are set forth concerning the said dismissal.

(1) The only determination that she made was: "having determined that the federal question claim is wholly insubstantial, the proper course is to dismiss for lack of jurisdiction without reaching the question of whether the complaint states a claim upon which relief can be granted." (We emphasize that she made this determination without reaching the question of claim upon which relief can be granted.)

(2) Judge Robinson, later in her discussion, in referring to the substantiality of the federal claim states: "Accordingly, this court must dismiss the Plaintiffs' Complaint in its entirety for lack of jurisdiction."

(3) Judge Robinson uses the word opinion twice in her discussion, first when she stresses the fact that she is not expressing an opinion on the substantiality of Plaintiffs' state law claims, and again in referring to failure to state a claim upon which federal relief could be granted.

(4) An opinion is not a determination as defined by Webster. Determine, as defined, is "to end or settle conclusively." Opinion, as defined, is a "judgment or belief without

certain, or conclusive, evidence."

(5) Judge Robinson's opening statement to the effect that the Plaintiffs have alleged that the various Defendants have violated the Plaintiffs' Constitutional rights by denying them due process of law is not true; the Plaintiffs alleged that the judges were the violators of their Constitutional rights, and the other Defendants were liable to the Amends because they made themselves constructive trustees by breaching, and aiding and abeting the Trustee in the breach of the fiduciary rights. (R.p 192).

(6) Judge Robinson stresses that the Court is not rendering an opinion on the substantiality of state law claims alleging the breach of fiduciary duty in the administration of the trust. The Amends did not request the Court to render such opinions, however by law, the Court should accept pendent jurisdiction if the federal question is substantial and the same evidence will prove federal and nonfederal claims; and it does. (R.p 157). The Amends believe that the federal question is more than substantial for the reason that Judge Poff does not dispute the fact

that he reexamined facts tried by jury, and barred J. D. Amend from the trial proceedings even though Amend was a plaintiff of record; that Judges Marshall, Blackburn, and Sheehan refused to hear James E. Amend's title matters in their proper place of venue, and that Judge Sheehan's refusal to allow Amend to take a nonsuit between the summary judgment hearing and the pronouncement of the judgment. (Brief of Appellants, p.12).

BRIEF OF APPELLEES POFF AND HARNEY

(1) Poff and Harney repeatedly allege that the Amends' allegations are conclusory, however, the only things that they specifically deny are:

(a) Appellees Poff and Harney can and do deny that any action taken in their capacity as State District Judges toward the Appellant resulted in an unlawful purpose or denied the Appellant any Constitutional right".

(b) They further deny aiding and abetting any individual or entity in "breaching the said Plaintiffs' fiduciary rights".

(2) Poff and Harney do not dispute the facts that:

(a) The Seventh Amendment to the Constitution of the

United States forbids any court from reexamining facts tried by a jury.

(b) That Judge Poff reexamined not one, but five facts tried by a jury that were favorable to Trust Beneficiery James E. Amend, and then declared a mistrial at the Trustee Amarillo National Bank's request, which deprived Amend of $609,000.00 which most certainly did not serve his best interest, while on the other hand, the breach of his fiduciary rights benefitted the Trustee in an amount of $609,000.00.

(3) Poff and Harney do not dispute the fact that the same evidence will establish the Constitutional rights claim and also the breach of fiduciary rights claim.

(4) Poff and Harney do not dispute the fact that Defendant Attorney R. A. Wilson presented more evidence on their behalf than did their own attorney even though Wilson was not their attorney of record.

(5) They do not dispute the fact that Judge Harney has not permitted J. D. Amend to have his day in Court concerning a matter that was filed in her Court in 1982, and that she repri-

manded Amend for representing his son in her court, which the evidence shows that he was not doing, and that she strongly suggested that he should be in Poff's Court.

(6) They do not dispute the fact that R. A. Wilson, in his capacity as the Amarillo National Bank's Attorney, had alleged that J. D. Amend was representing his son, and that he also falsely alleged that the issues were the same in the subject case and the case pending in Poff's 47th District Court.

(7) It is an undisputable fact that there were no issues related to arbitration in Poff's Court.

(8) Poff and Harney can not dispute the fact that their attorney, Gary W. Barnard as their representative in this appeal, filed a Brief in which he cited case law as a means, and for the purpose of having the dismissal affirmed by this Court, which would ultimately deny the Amends their day in Court.

BLACKBURN, MARSHALL, AND SHEEHAN

(1) Judges Blackburn, Marshall, and Sheehan do not dispute the Amends' allegation that Trust Beneficiary James E.

Amend was denied his right to have his title matters heard in their proper place of venue by each of the judges.

(2) The Texas Attorney General, in representing these three judges, has suggested a third ground for dismissal; something that has no place in this appeal for the reason that it was not presented to the Court previous to her dismissal, therefore it could not have been material to the correctness of Judge Robinson's determination to dismiss, however the purpose for which the judges suggested the third ground is material; it was intended to aid in having the dismissal confirmed which would ultimately deny the Amends their day in Court.

(3) The judges also made allegations and cited laws that were for the unlawful purpose of preventing the Amends from presenting their grievances for hearing.

(4) Judge Sheehan does not dispute the fact that he refused to premit Trust Beneficiary, James E. Amend, to take a nonsuit between a summary judgment hearing the the pronouncement of the judgment.

AMARILLO NATIONAL BANK

(1) It is an incontrovertable fact that the Bank's Brief, and its content, was filed for the purpose, as is stated in its CONCLUSION: "The Defendant-Appellee, Amarillo National Bank, prays the Court that the judgment of the trial court be affirmed."

(2) The Amarillo National Bank's Brief contains more than 25 pages of material, practically all of which relates to state Judges Poff, Harney, Marshall, Blackburn, and Sheehan.

(3) Appellee R. A. Wilson, attorney for Amarillo National Bank, in dealing with Judge Poff's declaration of mistrial refers to the matter at pages 4 and 5 of the Brief and again at page 21; he does not dispute the fact that Judge Poff reexamined facts tried by a jury, and that it is evidenced by material that he, Wilson, introduced. (R.p 97).

(4) It is alleged in the Brief that Judge Poff resolved disagreements by declaring a mistrial; this in spite of the fact that the judgment itself gives no reason for the mistrial declaration. (Page 5 of Brief).

WILSON AND STONE

(1) The Brief for Appellees D. Barry Stone and R. A. Wilson cites a total of 36 Statutes, Rules, and Cases, all for the purpose of having this Court affirm the judgment of the District Court, which if affirmed, would prevent the Amends from having their grievances heard concerning and related to the violation of their Constitutional rights.

(2) Under the Statement of Facts in the subject brief at page 3, the following is stated: "The Appellees who were original defendants in the court below include the trustee of the trust, various entities who dealt with the trustee in transactions involving trust property,". The Amends have not alleged that the insurance company had any dealings whatsoever with the trustee of the trust.

(3) Stone and Wilson say that it is difficult if not impossible to interpret the alleged facts in relationship to the purported causes of action asserted by the appellants, and from a review of the Appellant's complaint and the brief before this Court it is apparent that Wilson and Stone were involved only

as privately retained counsel of Amarillo National Bank. They do not dispute the commission of any of the acts which the Amends have alleged were for the unlawful purpose of denying them their day in court, and neither will they dispute the fact that the purpose of their latest brief was to have a dismissal affirmed which would preclude the Amends from having their grievances heard in the U.S. District Court.

(4) Wilson and Stone do not dispute the fact that they have aided and abeted the trustee, Amarillo National Bank, in defeating the Amends' rights, and that, by law, where the same evidence will prove federal and nonfederal claims, the discretion of the court should be exercised to accept jurisdiction. (R.p 157).

(5) Wilson and Stone do not dispute the fact that it must appear beyond doubt that plaintiff can prove no set of facts in support of claim before court can grant motion to dismiss for failure to state claim under 42 USCS 1983. (R.p 192).

(6) Wilson and Stone do not dispute the fact that, by law, that any person, a judge, a lawyer, or anyone else who, because

of his very own conduct in dealing with the fiduciary ties of Trustee–Beneficiary relationship has made himself liable to the Beneficiary, will in fact be held a Trustee for the person whose rights he sought to defeat. (R.p 192).

(7) Stone and Wilson do not dispute the fact that Collusion in judicial proceedings is defined as a secret agreement between two persons that one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose. (R.p 177).

(8) Stone and Wilson do not dispute the fact that they represented the Trustee Amarillo National Bank, one of the defendants, in the Dallas County land partition suit in which the Trustee paid Lindmark's legal expenses to sue the said Trustee and its Beneficiary, James E. Amend, and that Stone gave favorable testimony for Lindmark without even being subpoenaed; this in addition to otherwise cooperating with R. L. Templeton. (Brief of Appellants p.9).

The statement in their brief to the effect that Stone and

Wilson were involved only as privately retained counsel is simply not true.

R. L. Templeton

(1) It is difficult to reply to Templeton's Brief for the reason that it contains so many false and incorrect statements.

(a) The Amends have not chosen to sue every lawyer that has been aligned against them in any way, and the judge of every court in which the suits were pending; in fact two lawyers in Templeton's firm who actively took part were not sued.

(b) Attorney Templeton takes exception to Amends' statement that he cannot deny that he has conspired with other lawyers and with Amarillo National Bank as trustee to defeat the rights of Plaintiffs through legal means to accomplish an unlawful purpose. He may be partially right. The statement should read that "he cannot truthfully deny". He does not dispute the fact that partitioning land is a legal means of dividing it. He does not dispute the fact that he obtained a deed of trust from Stone and Wilson which was used in the partition suit proceedings. He does not dispute the fact that he used

Stone as a witness without having to subpoena him in the trial. He cannot truthfully dispute the fact that J. D. Amend agreed to dismiss him from these proceedings if he could produce a written agreement wherein the Amarillo National Bank agreed to indemnify Keith Lindmark against any claim of the Amends which Lindmark instigated. He is still a party to the suit.

(c) The Amends believe that Bob Templeton will have a very difficult time in finding anyone gullible enough to believe that the cross-action which he refers to was not instigated by Lindmark. There would have been no cross-action unless Templeton had filed the suit.

(2) About the only material thing in Templeton's Brief related to the correctness of Judge Robinson's dismissal in the incontrovertable fact that the purpose of the said brief was to request this Court to affirm Judge Robinson's judgment, which would result, if granted, in the Amends not being permitted to have their day in court.

DAVID C. MATTKA

Defendant David C. Mattka did not file a Brief in this appeal matter, however it has no relevance other than that he does not dispute the Amends' allegations of his involvement in violating the Constitutional rights and breaching the fiduciary rights of Appellant James E. Amend. On the other hand, he has not committed any further acts for an unlawful purpose, which he would have done had he filed a Brief.

KEITH LINDMARK

Appellee, Keith Lindmark did not file a Brief; he adopts by reference the Brief of Appellee Amarillo National Bank, Judges Marshall, Blackburn, and Sheehan, D. Barry Stone and R. A. Wilson. This does not materially change anything other than that Lindmark is now citing some 40 or 50 Statutes, Rules, and cases for the unlawful purpose of denying the Amends their day in court. He is also adopting, and should be bound by, the false, misleading and diversionary allegations contained in the subject Briefs. He does not dispute the fact that on August 3, 1982, he testified upon his oath that the Amarillo National

Bank was paying his legal expenses, and had actually paid his expenses in the partition suit in which he sued the said Trustee Bank and its Beneficiary James E. Amend. He does not dispute the fact that this collusive conspiracy (p.13 Brief for Appellants) in which he was involved with Amarillo National Bank, his attorney R. L. Templeton, and the Bank's attorneys, D. Barry Stone and R. A. Wilson was fraudulent and was for an unlawful purpose; it was a breach of fiduciary duty and responsibility owed to the Beneficiary. He does not dispute the fact that, by his own acts, he made himself a constructive trustee and is liable to the said Beneficiary. As a matter of fact, none of the other involved appellees dispute any of these alleged facts either.

NORTH STATE BANK, NOW BANcCENTRAL

Appellee BancCentral has little standing in this appeal and its reply seems to be to no effect. It does not alter the fact that the judges were the individuals who were charged with violating Constitutional rights, and the dismissal was based on the substantiality of the federal question. BancCentral does not dis-

pute the fact that what it did aided and abeted the Trustee in a breach of fiduciary rights, and that by doing so it made itself liable to the Trust Beneficiary.

PRUDENTIAL

Appellee Prudential occupies much the same position as BancCentral; in fact, BancCentral adopts some of Prudentials pleadings.

Prudential does not dispute the fact that it subrogated its lien and that its act resulted in an unlawful purpose. It will no doubt admit that its Brief was filed for the purpose of having this Court affirm the trial courts disrnissal of the Amends' cause of action which would ultimately result in denying them their day in court.

It is noteworthy that the Amends have not alleged that Prudential took part in denying them the right of trial by jury in state courts; in fact the Amends have never before sued Prudential in state courts.

It is also noteworthy that Marvin W. Jones, the party who signed Prudential's Brief, is a member of the same firm of

attorneys as is another attorney who examined some of Amends' evidence some years ago, and then declined to represent James E. Amend because a third member of the firm had prepared the "Trust Agreement".

GASSAWAY AND GURLEY

Appellees Gassaway and Gurley have adopted much of Amarillo National Bank's pleadings and they will be in much the same position as Keith Lindmark as set out herein. Gassaway and Gurley do not dispute any of the facts of material evidence alleged by the Amends. Gassaway and Gurley will most likely not attempt to controvert the fact that their Brief was filed for the purpose of requesting the Court to affirm the trial court's dismissal which would result in denying the Amends their day in court.

It is interesting to note that Gassaway and Gurley seem to think that they should be dismissed because Diversified Beef, one of the Plaintiffs, did not appeal. This is just about as reasonable as it would be for the Amends to ask for judgment by default for the reason that Gassaway and Gurley failed to answer

individually; they were sued individually and as a firm.

SUMMARY OF ARGUMENT

The Amends' appeal is one in which they claim that Judge Robinson incorrectly dismissed their case on the grounds that she concluded that there is no legal substance in the Plaintiffs' Constitutional claims, and that she was also of the opinion that dismissal would be proper based upon Defendants' Motions to Dismiss for failure to state a claim upon which federal relief could be granted.

The Amends have alleged that their Constitutional rights have been violated by acts of the State Court Judges, which they say were not normal judicial functions, and were for an unlawful purpose. The Amends further say that the same acts which denied them their day in court also breached fiduciary rights.

The Amends have alleged indisputable, and undisputed facts in support of their claim, while on the other hand, practically all the Appellees make unsupported statements, such as: the suit was properly dismissed in its entirety for want of juris-

diction and also for failure to state a cause of action upon which relief could be granted, and; Pendent jurisdiction was likewise properly denied for want of a substantial federal question. Appellants believe that such obstinate allegations have no place in this appeal, and that opinions are for the Court.

ARGUMENT

The Amends contend that there are very few, if any, undisputed facts of material evidence before the court to support the correctness of Judge Robinson's dismissal, and that the laws cited and employed by the Appellees are for an unlawful purpose and wholly fail to support the said dismissal, and that laws and rules should never supersede justice; they further contend that Judge Robinson's dismissal for lack of jurisdiction is based more on Appellee R. A. Wilson's obfuscatory allegations than it is on the true and material facts of evidence.

FIRST: We examine the evidence related to the mistrial declared by Judge Poff. All the evidence before the court confirms the fact that Judge Poff reexamined facts tried by a jury. This is even verified by Appellee R. A. Wilson in the 52 page

"Reply of Defendant, Amarillo National Bank", (R.p 297) which shows the facts that were tried by the jury that Judge Poff reexamined. The reexamination of facts tried by a jury is forbidden by the Seventh Amendment to the United States Constitution. R. A. Wilson does not dispute the fact that Poff reexamined facts tried by a jury, he in fact confirmed it; Wilson does nothing more than attempt to justify an act which violated the Constitutional rights and also breached the fiduciary rights of Appellant James E. Amend by alleging that: "These were the disagreements which Judge Poff resolved by declaring a mistrial." (p. 5—Amarillo National Bank Brief). The allegation is not material; the fact remains that Poff reexamined facts tried by a jury. It is significant that R. A. Wilson stated a reason for the declaration of the mistrial. Poff's Order contained no reason for his declaration, therefore Wilson's knowing what Poff intended to resolve tends to evidence the conspiracy which the Amends have alleged. Wilson does not controvert the material facts of evidence, he only attempts to divert the attention away

from such facts, and then focus it on something else. Obfuscation has been predominate in his method of presentation in the state courts, in the U.S. District Court and now in this Court; all for the unlawful purpose of denying the Amends their day in Court.

SECOND: Again, in addressing the dismissal as it relates to Judges Marshall, Blackburn, and Sheehan, the Amends' argument is basically the same as that presented above in relation to Judge Poff's declaration of a mistrial, and for the reason that R. A. Wilson actually assumed the role as protector of these judges, and has presented more evidence and obfuscatory facts in their behalf than has the Texas Attorney General, who is supposed to be representing them, there is no need to repeat. The Amends do not claim that Judges Marshall, Blackburn, and Sheehan have violated Trust Beneficiary James E. Amend's Constitutional rights under the Seventh Amendment, however, they do claim that the judges' refusals to hear Amend's title matter in the proper places of venue violated his Constitutional rights, and also breached his fiduciary rights; also that Judge

Sheehan's refusing a nonsuit before summary judgment was pronounced violated his Constitutional rights. The material facts are not disputed; only unrelated laws, rules, and facts that are completely irrevelant to this appeal are presented by Wilson. He discusses such matters as the partition of land, the citing of cases related thereto and he states that the Amends have cited no cases and that he knows of none suggesting that Judge Sheehan's signing a partition decree deprived any plaintiff of any right protected by the Constitution or law of the United States. The Amends have made no such allegations, and they know of no cases, nor do they believe that any of the Appellees have cited any cases that relate to the commission of acts for unlawful purpose where the same said acts violated Constitutional rights and also breached fiduciary rights. As to citing cases wherein rights guaranteed under the Amendments to the United States Constitution have been violated the Amends believe that the Amendments are free of such qualifications and that they speak for themselves.

THIRD: The claim addressed to Judge Harney as it relates to the denial of the due process of law, is simply that Appellant J. D. Amend filed a motion in Judge Harney's Court in 1982 requesting the enforcement of an arbitration agreement, and that it is now 1985 and that Amend has still not had his claim resolved.

FOURTH: Judge Robinson's discussion in her dismissal Order definitely reflects that R. A. Wilson's obfuscatory allegations were the basis of her determination and opinions, and that the true undisputed facts of material evidence were, to say the least, afforded little consideration.

(1) Judge Robinson states: "Having determined that the federal question claim is wholly insubstantial, the proper course is to dismiss for lack of jurisdiction" — R. A. Wilson alleges: "Pendent jurisdiction was properly denied for want of a substantial federal question". — The true undisputed facts are:

(a) Judge Poff reexamined facts tried by a jury, declared a mistrial, and thereby denied Appellant James E. Amend $609,000.00.

(b) Judges Marshall, Blackburn, and Sheehan refused to hear title matters in their proper places of venue – The federal question claim is definitely substantial.

(2) Judge Robinson states that the Court stresses that it is not rendering an opinion on the substantiality of state law claims alleging the breach of fiduciary duty in the administration of the trust. – R. A. Wilson alleges that the Amends' complaint arises from the mismanagement of a trust. The true undisputed facts are:

(a) The Amends did not request Judge Robinson to render an opinion on their state law claims; the state law claims are pending in state court.

(b) What the complaint arises from is not material; the result of the judge's acts is material.

(c) The Amends' complaint arises from the acts committed by the state court judges which the Amends allege resulted in violation of their Constitutional rights and also breached their fiduciary rights.

(3) Judge Robinson states: "even if the Plaintiffs' claim is not foreclosed by prior authoritative decisions, the claim must be more than frivolous to support federal question jurisdiction." – R. A. Wilson alleges: "With respect to these suits the complaints which Plaintiffs now make were adjudged against them". – The true and undisputed facts are:

(a) R. A. Wilson knows that the judgment in the partition suit, one of the suits which he refers to, in which Amarillo National Bank paid Lindmark's legal expenses to sue the said Trustee Bank and its Beneficiary, was collusive and that he took part in it, and is now employing it for the unlawful purpose of denying the Amends their day in court. By law, the judgment was fraudulent (R.p 176, 177), and also, by law, D.C. TEX. 1977 – Principle of res judicata is circumscribed by due process requirement that one not be denied his day in court – U.S. v. State of Texas 430 F. Supp. 920.

(b) There is no fact of material evidence before the Court that supports the correctness of Judge Robinson's dismissal; only the unsubstantiated statements of the Appellee's attorneys.

(4) Judge Robinson states: "Finally, the Court is also of the opinion that dismissal of this cause would be proper based upon the Defendants' Motions to Dismiss for failure to state a claim upon which federal relief could be granted". – R. A. Wilson repeatedly alleges: "If we direct our attention to the facts alleged as distinguished from the conclusory allegations," – The true undisputed facts are:

(a) R. A. Wilson does not dispute any specific allegation which he characterizes as conclusory, however he does allege that: The record reveals that without exception these charges are denied by the defendants; this, to say the least, is misleading as the record reflects nothing more than general denial, however Wilson's allegation does reflect the obfuscatory character of his presentation.

(b) Neither does Wilson identify the facts alleged by Plaintiffs, nor does he identify the conclusory allegations.

(c) Judge Robinson based her opinion upon the Defendants' Motions that were presented to the Court; the Motions

had nothing whatsoever to do with the validity, or the merits, of the Amends' Claim.

FIFTH: Appellee, R. A. Wilson has a great deal to say with respect to the Appellees' acts under the color of state law. The Amends rely principally on the following quote taken from the May 14, 1984 U.S. SUPREME COURT DECISION, (R.p 185) repeated for emphasis: "THE VERY PURPOSE OF 1983 WAS TO IMPOSE THE FEDERAL COURTS BETWEEN THE STATES AND THE PEOPLE, AS GUARDIANS OF THE PEOPLE'S FEDERAL RIGHTS – TO PROTECT THE PEOPLE FROM UNCONSTITUTIONAL ACTION UNDER THE COLOR OF STATE LAW, WHETHER THAT ACTION BE EXECUTIVE, LEGISLATIVE OR JUDICIAL.' "407 U.S. at 242, 32 L Ed 2d 705, 92 S Ct 2151".

The laws cited that are material to the dismissal, support the fact that the said dismissal was incorrect, as do the undisputed facts of material evidence.

The Amends present the following comments which in no way relate to the dismissal matter, but something which they believe that all the courts should consider.

(1) This controversy has been going on since 1971. It needs to be resolved.

(2) Because the Amarillo National Bank has twice declined to honor its agreement to settle the matter out of court and to arbitrate if necessary, it becomes obvious that the courts will have to settle it. Nothing can be gained by prolonging the delay.

DISCUSSION

This discussion relates to the subject dismissal only indirectly, however, for the reason that Appellee, R. A. Wilson has assumed the role as protector of practically all the defendants and some of the appellees have adopted his pleadings, plus the fact that his technique is so clearly reflected in most of the Appellee pleadings, the Amends deem it advisable to direct this Court's attention to obfuscation at its best. R. A. Wilson, being the well informed and highly skilled attorney that he is, is a past

master at diverting attention, confusing the issue, obscuring the facts, and generating chaotic bewilderment in his cleverly conceived presentations:

(1) He has introduced up to 50 pages of material, mostly irrelevant to the point of being frivolous, in Judge Robinson's U.S. District Court, in Judge Marshall's District Court, in Judge Blackburn's District Court, and in Judge Sheehan's District Court.

(2) He has introduced false pleadings into the evidence of the above mentioned state courts and into Judge Harney's Court by alleging that the charges were the same in the cases in their courts as those in Judge Poff's Court.

(3) He has repeatedly tried to confuse Constitutional rights matters, property title matters, and arbitration matters with Trust mismanagement.

(4) He has cited worker's compensation law in Judge Poff's Court to determine trust questions.

(5) He requested the U.S. District Court to delcare a fraudulent "Termination of Trust" document valid, and to restrain

the Amends from filing more lawsuits for such things as clearing titles and removing liens on property which the Trustee had purported to convey with fraudulent documents, this in the event that the Court accepted jurisdiction of this matter. The request was for the purpose of protecting the poor underprivileged Amarillo National Bank against suits which were spawned and necessitated by Wilson's fraudulent conveyances, and his request for severance and separate trials which Poff granted.

(6) At page 6 of Defendant Amarillo National Bank's Brief, R. A. Wilson refers to Judge Sheehan's signing of nonsuit judgment for Amend. This nonsuit request was necessary for the reason that the Bank's attorney made false representation to the Court and the venue change to Potter County was granted. The fact remains that Judge Sheehan refused to hear Amend's title matters in the proper place of venue and how he did it is not material. The non-suit was strictly an economy measure, the matter was included in a supplement to another suit already filed in Potter County. This is more delay and has created two additional delinquent tax lawsuits.

CONCLUSION

This abusive matter has been in litigation for 9 years; it needs to be resolved. The following is repeated to emphasize this need:

A. Just before permitting the Trust Beneficiary to try less than 2 percent of his overall claim in a hearing of the small portion which Judge Poff had created by severance at the Trustee's request following consolidation of two causes, also at the Trustee's request, Judge Poff summoned the Beneficiary into his office and on behalf of the Trustee Amarillo National Bank told the Beneficiary that unless he accepted a $475,000.00 settlement of his entire claim, the Bank's attorneys would make his father look like Billy Sol Estes. The jury verdict on the 2 percent tried was $609,000.00. Judge Poff then declared a mistrial; he has refused to set additional trial dates since 1981.

B. Judge H. Bryan Poff has falsely upon his oath that R. A. Wilson has never represented him in a recusement hearing. Following the declaration of mistrial by Judge Poff, James E.

Following the declaration of mistrial by Judge Poff, James E. Amend filed a motion to recuse him; R. A. Wilson represented Poff at the hearing.

C. The Trustee Amarillo National Bank paid Keith Lindmark's legal expenses to sue the said Trustee and its Beneficiary, James E. Amend. R. L. Templeton represented Lindmark while being paid by the bank. Templeton had declined to represent Amend after looking over much of the same evidence used in the lawsuit. Judge Sheehan presided in the trial, and was aware of the fraud and collusion at the time he refused to permit Amend to nonsuit preceeding the granting of the summary judgment in the Bill of Review filed by Amend.

D. All of the Defendant attorneys have made false representations to the Courts in order to secure rulings by the various named Judges that are contrary to state law, such as transferring venue on title matters out of the counties where the properties lie and the liens are recorded.

The facts are very definitely substantial, and they do establish a federal question. The acts by the State Court Judges

violated the Constitutional rights of the Amends and these acts were committed at the request of the Defendants; these Defendants, acting under color of state law, all aided and abeted the Trustee in defeating the rights of the Amends. None of the facts herein are disputed by the Defendants.

Finally, the Trustee Amarillo National Bank has employed means, both legal and fraudulent, to defeat the rights of the Amends.

The Amends pray the Court that the judgment of the trial court be set aside, and that the Court grant them any and all other relief to which they may be entitled.

Respectfully submitted,

/s/ James E. Amend

/s/ J. D. Amend

CERTIFICATE OF SERVICE

It is certified that on May 4, 1985, a true reproduction of the foregoing Reply Brief was forwarded to all the attorneys as listed herein, for all the Appellees, at the addresses of record shown herein, by U.S. Mail.

/s/ J. D. Amend

AFFIDAVIT OF J. D. AMEND

STATE OF TEXAS:

COUNTY OF POTTER:

BEFORE ME, the undersigned authority, a Notary Public in and for Potter County, Texas on this day personally appeared J. D. AMEND, who, being by me first duly sworn, on oath says: That he is familiar with all of the Amends' pleadings in the subject Cause and the facts, as stated therein, are true and correct. He further says that this affidavit is made for the reason that so many of the Defendant-Appellees' allegations are misleading and incorrect.

/s/ J. D. AMEND

SWORN TO AND SUBSCRIBED before me by J. D. Amend on this 30th day of April, 1985.

/s/ Terry Ann Thompson

Notary Public for Potter

County, Texas

My Commission Expires 9-4-85.

Supreme Court, U.S.
FILED
AUG 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-183

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1985 Term

JAMES E. AMEND and J.D. AMEND,
Petitioners,

v.

H. BRYAN POFF, JR., NAOMI HARNEY, MARVIN MARSHALL, J.E. BLACKBURN, BILL SHEEHAN, AMARILLO NATIONAL BANK, KEITH LINDMARK, DAVID C. MATTKA, D. BARRY STONE, R.A. WILSON, ROBERT L. TEMPLETON, GASSAWAY & GURLEY, NORTH STATE BANK and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

Appeal From a Judgment of
The United States Court of Appeals
For the Fifth Circuit

REPLY OF RESPONDENT, ROBERT L. TEMPLETON TO PETITION FOR WRIT OF CERTIORARI

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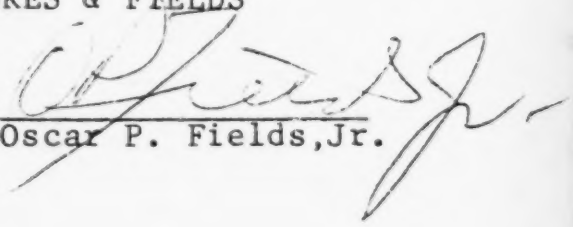
CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney for Respondent, ROBERT L. TEMPLETON, certifies that the list of persons and parties having an interest in the outcome of this case on Page 48-49 of Amends' Petition for Writ of Certiorari is correct.

STOKES & FIELDS

By: 
Oscar P. Fields, Jr.

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IN THE

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Respondents.

Respondent, TEMPLETON's, Response to Petitioners' Statement of Jurisdiction

---

1. The Amends' on Page 2 and 3 of their Petition for Writ of Certiorari ground their appeal under the provisions of 28 U.S.C. Section 1253. This provision of the U.S. Code has not the remotest application to the case at bar, but deals instead with appeals from orders granting or denying injunctions in cases required

to be heard by three judge district courts.

2. Petitioners' "QUESTION PRESENTED" on the very first page of their Petition shows on its face that there is no Federal Jurisdiction to support this appeal. In defining their "Question Presented", Petitioners clearly show that their suit is founded in the claim that a trial judge in a State District Court incorrectly or wrongfully overturned a jury's verdict. As a matter of law, such a claim presents nothing for federal review.

3. There is no substantial Federal question.

4. Petitioners make no effort to ground their Petition for Writ of Certiorari in any of the considerations governing such review under Rule 17 of the United States Supreme Court Rules.

STATEMENT

Respondent, TEMPLETON, is involved in this Petition for Writ of Certiorari only because he was a party to this suit in the Courts below and has not been dismissed from this suit and so remains a party thereto in The Supreme Court. That is to say, there is nothing in the Amends' Petition for Writ of Certiorari complaining against TEMPLETON.

ROBERT L. TEMPLETON is an Amarillo Attorney who represented one Lindmark in another suit involving Petitioner, JAMES EDWARD AMEND, where the jury verdict and Judgment were adverse to AMEND. While Petitioners have tried in the Courts below to connect the Lindmark Case with the case at bar where the Amends complain of JUDGE POFF setting aside a jury verdict, TEMPLETON is not attacked in the Petition before this Court. Accordingly, Respondent, TEMPLETON feels it appropriate

to address those jurisdictional questions on this appeal in which he is carried forward as a party.

When you review the AMENDS' Statement of the Question Presented and their Petition for Writ of Certiorari in its entirety, it becomes apparent that the basis of their suit is the action of JUDGE POFF in failing to render Judgment for AMEND on a jury's verdict finding damages in the amount of some $609,000.00 in the AMENDS' suit against AMARILLO NATIONAL BANK. In considering post-verdict motions and argument addressed to the sufficiency of the evidence and the sufficiency of the facts found by the jury to support any judgment, JUDGE POFF elected in his discretion to grant a mistrial and an Order of Mistrial was signed and entered by the Court. AMENDS' case against the Bank remains pending on Judge Poff's docket.

ARGUMENT

Federal jursidiction of course depends upon a "substantial Federal question" arising under some federal law which of course includes the Federal Constitution. Petitioners' only claim in their Brief is that their rights have been violated under the Fifth, Seventh and Fourteenth Amendments to the U.S. Constitution. These Amendments are respectively commonly known as the due process, right to trial by jury, and equal protection amendments.

Particular emphasis is upon the Seventh Amendment because JUDGE POFF granted a mistrial in a case where the jury had returned what the AMENDS contend was a verdict in their favor for $609,000.00 in damages. That argument is purely frivolous. Since Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943), the constitutionality of the directed verdict has been

unquestionably upheld and since Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935) and Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), judgments n.o.v. have been upheld in appropriate cases without question. New trials granted in the sound discussion of the trial court have always been held constitutional and have been a part of our state and federal practice from the beginning of our jurisprudence. Tarlton v. Exxon, 688 F.2d. 973 (5th Cir. 1982), Spurlin v. General Motors Corporation, 528 F.2d. 612, rehearing denied 531 F.2d. 279 (5th Cir. 1976), and cases cited in both Courts of Appeals cases.

Neither can Petitioners' raise a federal question supporting jursidiction under the Fifth or Fourteenth Amendments or the underlying Civil Rights Acts 42 U.S.C. Sections 1983 and 1985. There is

and could be no allegation or claim that JUDGE POFF was acting outside of his jurisdictional authority when he ordered the mistrial in the AMEND case on trial in his Court. Petitioners claim injury resulting from JUDGE POFF's action in his capacity as Judge of the 47th District Court of Potter County, Texas and while acting in such capacity, JUDGE POFF is absolutely immune from liability and suit in whatever he does. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1972) is perhaps the most cited and the foundation case upholding the immunity of a Judge from suit and liability growing out of any acts within his "judicial jurisdiction". The Pierson case was brought under Title 42 U.S.C. Section 1983 by Plaintiffs who were arrested, tried and convicted by Judge Spencer under a statute unconstitutional in the manner of its application to the Plaintiffs. In

upholding Judge Spencer's absolute immunity from liaiblity for an unconstitutional conviction our Supreme Court said:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking, but to intimidation.

We do not believe that this settled principle of law was abolished by §1983, which makes liable "every

person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congres meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that congress would have specifically so provided had it wished to abolish the doctrine."

In Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), Judge Stump was sued for erroneously and incorrectly approving the sterilization of a female. In again affirming the absolute immunity from suit of a Judge acting within his judicial jurisdiction, this Court said:

"The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was a "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions,

without apprehension of personal consequences to himself." Bradley v. Fisher, supra, at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall, at 351. Later, we held that this doctrine of judicial immunity was applicable in suits under §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, for the legislative record gave no indication the Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .," Bradley, supra, at 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." 13 Wall, at 351." (Emphasis ours)

"Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall, at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit."

The doctrine of judicial immunity prevails even though the judge's actions may have been prompted by corruption although this certainly is not the case here. In Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), a Duvall County Texas District Judge wrongfully signed an injunction order, corruptly motivated apparently by a bribe. While holding that the action of the Judge was sufficient state involvement to subject his co-conspirators to suit under 42

U.S.C. Section 1983, suit against the Judge under that section was dismissed. This Court held that while a Judge is not immune from criminal prosecution, he is absolutely immune from liability in suits for damages brought against him under 42 U.S.C. Section 1983 based upon acts performed in his judicial capacity.

Petitioners allege no facts amounting to corruption in their suits against these Judges and even if they did the Judges would be immune from suit and liability. McAlester v. Brown, 469 F.2d 1280 (5th Cir., 1972) was cited favorably by this Court in Stump v. Sparkman, supra. McAlester involved the judge who lost his temper and unjustifiably sentenced one to jail to satisfy his personal anger. All of the considerations applied in McAlester are met in the case at bar. Whatever our Judges are alleged to have done (1) occurred either in the Judge's chambers or

in the courtroom, (2) the controversy centered around a case then pending before the Judge, and (3) the acts occurred in the course of the Judge's actual handling of such case pending in his court. There is accordingly no escape from the doctrine of strict immunity in this case.

Even more basically, the AMENDS' Petition in this Court (and their Plaintiffs' Petition in the Trial Court), alleges no facts giving rise to a cause of action against any defendant. All of Petitioners' allegations are mere assumptions and conclusions. Conclusory allegations of denial of due process, malicious motivation and illegal motive when unsupported by pleaded facts are insufficient to create a cause of action under 42 U.S.C. Section 1983 and dismissal of the Complaint will result. Earnest v. Lowenthritt, 690 F.2d. 1198 (5th Cir. 1982).

Most fundamentally, there is no attempt by the AMENDS to support their Petition for Writ of Certiorari by defining any conflict in State or Federal decisions as outlined in Rule 17 of the Supreme Court Rules.

CONCLUSION

As the United States Fifth Circuit Court of Appeals says in this case from page three of their June 3, 1985 Opinion:

> "In this circuit, it is a "well settled rule that a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." Hagerty v. Succession of Clement, 749 F.2d 217, 220 (5th Cir. 1984). Although the complaint could be read as asserting a conspiracy between the judges and the other defendants, see Dennis v. Sparks, 449 U.S. 24 (1980), it alleged no specific facts that might establish such a conspiracy, other than the adverse rulings themselves. Absent such specific allegations, a charge of judicial collusion does not state a substantial federal claim. See Arseneaux v. Roberts, 726 F.2d 1022 (5th Cir. 1982); Earnest v. Lowentritt, 690 F.2d 1198 (5th Cir.

1982); Phillips v. Mashburn, 746 F.2d 782 (11th Cir. 1984)."

Certainly where no cause of action can arise against judges acting within their judicial jurisdiction, there can be no "substantial Federal question" to support jurisdiction in this Court a rising from the AMENDS' illfated attempt to state such a cause of action and their Petition for Writ of Certiorari should be denied, for which your Respondent, ROBERT L. TEMPLETON, prays.

Respectfully submitted,

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By: Oscar P. Fields Jr.
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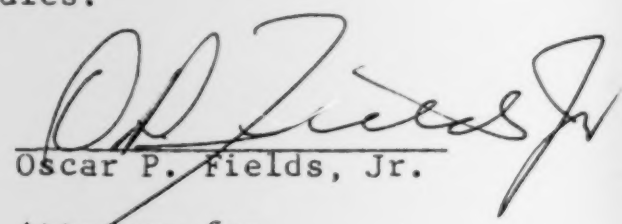
Bar No. 06980000

ATTORNEYS FOR
RESPONDENT, ROBERT L.
TEMPLETON

CERTIFICATE OF SERVICE

The undersigned attorney for Respondent, ROBERT L. TEMPLETON, hereby certifies that true and correct copies of the foregoing Reply of Respondent, TEMPLETON, to the AMENDS' Petition for Writ of Certiorari have been forwarded to counsel for each other party separately represented in this proceeding, or if unrepresented, to the party himself, by depositing same in a U.S. Post Office with First Class Postage Pre-Paid, properly addressed to counsel of record or the party at his post office address, all according to the provisions of Rule 28 of the Supreme Court Rules.



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Attorney for
Respondent, Robert L.
Templeton

Supreme Court, U.S.
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No. 85-183

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAMES E. AMEND, *et al.*,
Petitioners,

v.

H. BRYAN POFF, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT, AMARILLO NATIONAL BANK, IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT, AMARILLO NATIONAL BANK, IN OPPOSITION

The Respondent, Amarillo National Bank, respectfully prays that the Petition for a writ of certiorari of the Petitioners, James E. Amend and J. D. Amend, be denied.

STATEMENT OF THE CASE

We supplement briefly the statement of the case made by Petitioners.

We attach as Appendix A to this reply a reproduction of the notice of appeal to which reference is made in the Petition. It is apparent that this is not a case

in which the Supreme Court acquires jurisdiction by direct appeal pursuant to 28 U.S.C.S. 1252 and 1253. Accordingly this reply addresses itself only to the Petition for Writ of Certiorari.

Since the particular emphasis of the Petition is upon the act of Judge Poff in declaring a mistrial in a case tried in the 47th District Court of Potter County, Texas, it is recorded that the record before the Court of Appeals includes, as part of the appendix to the Bank's reply to the Amend motion for partial summary judgment, reproductions of four filed instruments in the Potter County suit,

(1) the order granting severance or separate trial (R.pp. 289, 290),

(2) the order with respect to the Bank's motion for partial summary judgment (R.pp. 291, 292),

(3) the charge of the Court and the jury's verdict (R.pp. 293 to 303) and

(4) the Bank's motion for judgment non obstante veredictor, alternatively for mistrial, alternatively for remittitur (R.pp. 304 to 308).

Brief reference must be made to Appendix C to the Petition for Writ of Certiorari. The Clerk of the Court of Appeals returned, unfiled, because received out of time, a reply brief tendered by the Amends. This reply brief, together with some related correspondence, is attached as Appendix C to the Petition. We say only that, having been returned unfiled, it constitutes no part of the record and that no complaint is now directed to the return of the brief unfiled.

REASONS FOR DENYING THE WRIT

I. Because the Seventh Amendment has not been viewed by this Court as applicable to trials in State Court, the granting of the mistrial by Judge Poff does not give rise to a substantial question of Federal Law.

The question presented for determination is stated in the Petition in this language:

> "Whether the Act of a Member of the Judiciary acting in His Judicial Capacity Whereby He reexamines Facts Tried by a Jury and Overturns the Jury's Verdict Constitutes a Substantial Federal Question Pursuant to the Seventh Amendment to the United States Constitution."

This question is directed to Judge Poff's declaring of a mistrial in the suit tried in Potter County, Texas.

This Court has consistently held that the Seventh Amendment relates only to trials in Federal Court and that States are left to regulate trials in their own courts in their own way. Cases supporting this statement include:

Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1876),

Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908),

Wagner Electric Manufacturing Company v. Lyndon, 262 U.S. 226, 43 S.Ct. 589, 67 L.Ed. 961 (1923),

Colgrove v. Battin, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973), and

Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974).

In the case last cited, in footnote 6 to page 265 of 39 L.Ed.2d, we find this language:

> "Moreover, the Seventh Amendment issue in this case is in a very real sense the narrower ground of decision. Section 812(a) expressly authorizes actions to be brought 'in appropriate State or local courts of

> general jurisdiction,' as well as in the federal courts. *The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.* Since we rest our decision on Seventh Amendment rather than statutory grounds, we express no view as to whether jury trials must be afforded in § 812 actions in the state courts." (Emphasis ours).

In the light of these cases, we say that there is no violation of constitutional or other federally protected right in Judge Poff's granting of a mistrial.

II. Even under the Federal Court practice there would have been no Seventh Amendment violation in the granting of a mistrial.

Even in the federal court practice, where without question the Seventh Amendment is applicable, it is held that there is no Seventh Amendment violation in the exercise of the Court's power to grant a directed verdict or a summary judgment or in the remittitur practice. *Tarlton v. Exxon*, 688 F.2d 973 (5 Cir. 1982); *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522 (11 Cir. 1983). This follows from the fact that in granting directed verdicts or summary judgments or in requiring remittiturs the Court is dealing with questions of law which the Court must determine and which do not require the intervention of a jury.

Support for this view is found further in *C. A. Treat Manufacturing Company v. The Standard Steel & Iron Company*, 157 U.S. 674, 15 S.Ct. 718, 39 L.Ed. 853 (1895). There the trial judge had directed a verdict, and the complaint made to this Court was that this denied the right of trial by jury. The holding of this Court was that when the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover and that a verdict, if rendered for the plaintiff, must be set aside, the Court may instruct the jury to find for

the defendant. If in so doing the Court errs as a matter of law, the remedy lies in a review in the appropriate court.

The Appendix to the Bank's reply to the Amend motion for partial summary judgment tells the Court that in accordance with Texas practice the jury had returned as its verdict its answers to the special issues submitted in the Court's charge, that the Bank had filed a motion for judgment non obstante veredicto, alternatively for mistrial, alternatively for remittitur (R.pp. 293 to 308), and that the question which thus faced Judge Poff was whether any judgment could be rendered in favor of plaintiff and, if so, for how much. A part of the problem was that the jury, while assessing punitive damages, had found none of the facts essential under Texas law to the assessment of punitive damages. Judge Poff responded to the Bank's motion by declaring a mistrial. In this there would have been no Seventh Amendment violation even if the case had been tried, and the action taken, in Federal Court.

The Amends make the purely conclusory allegation that the jury's answers entitle the plaintiff, James E. Amend, to a specific damage recovery and thus this petitioner was deprived of constitutionally and federally protected rights when Judge Poff declared a mistrial. The Amends have cited no cases supporting this view and we find none.

III. The petition does not demonstrate the violation of any constitutionally or otherwise federally protected right by any act charged to the other judicial defendants.

The primary reference we detect in the petition to the other judicial defendants is the statement, at pages 13 and 14 of the petition, that Judges Marshall, Blackburn and Sheehan have all refused to hear Amends' real property title matters in their proper places of venue. It is a sufficient reply that venue is necessarily determined

by the Texas statute. The Amends have cited no cases, and we find none, suggesting even remotely that a judge's ruling on a venue question can accomplish a violation of constitutionally or otherwise federally protected right.

IV. The existence of judicial immunity with respect to the Amends' demand for monetary damages is no longer an open question.

Although the Question Presented, as stated by the Amends, is addressed to Judge Poff's granting of a mistrial, the first reason stated for granting the writ is that the question of judicial immunity remains an important question of federal law which has not been settled by this Court. We find no justification for this. *Pulliam v. Allen*, —— U.S. ——, 104 S.Ct. ——, 80 L.Ed.2d 565 (1984), leaves undisturbed the principle of judicial immunity with respect to damage demands. This can hardly be regarded as an open question; but, if there be any continuing question as to the extent of judicial immunity, this cannot be a reason for granting a writ with respect to the non-judicial respondents.

V. The Amend suit was properly dismissed as to the non-judicial defendants because the facts pleaded, if accepted as true, do not show that the non-judicial defendants acted under color of state law.

The complaints addressed to the respondent, Amarillo National Bank, relate to the administration of a Trust. For purposes of this discussion, we think it suffices to say that the complaint asserts that in many and varied particulars the Bank failed to perform its duties as a fiduciary. This disagreement first reached the courthouse with the filing of two suits in Potter County which were ultimately consolidated into the suit which was tried in Judge Poff's Court. Since that first suit there have been a number of suits. In some of these the Bank has been the defendant. The Bank's position in each

of the cases to which it has been a party has been that of a defendant. With respect to the other defendants, excepting the State Court Judges, complaint is made of acts which are said to have assisted the Bank and to have harmed the Trust Beneficiary.

In *Taylor v. St. Clair*, 685 F.2d 982 (5 Cir. 1982), at page 987, the Court says:

> "It is axiomatic that in order to be entitled to relief under 42 U.S.C. § 1983, a plaintiff must show that he was deprived of a right secured to him under the Constitution or federal law, and that the deprivation occurred under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155-156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970); *Herwald v. Schweiker*, 658, F.2d 359, 362, n.5 (5th Cir. 1981); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611 (5th Cir. 1980). The phrase 'under color of state law' found in 42 U.S.C. § 1983, reflects the 'state action' requirement of the Fourteenth Amendment, consequently both phrases express the same legal principle. *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 877, n.7 (5th Cir. 1975). *cert denied* 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975); *Parish v. National Collegiate Athletic Association*, 506 F.2d 1028, 1031, n.6 (5th Cir. 1975)."

In *Earnest v. Lowentritt*, 690 F.2d 1198 (5 Cir. 1982) at pages 1200, 1201, the Court says:

> "Section 1983 does not reach all constitutional injuries, but only those caused by persons acting 'under color of state law.' 42 U.S.C. § 1983; *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). To act under color of state law for § 1983 purposes does not require, however, that the defendant be an officer of the state. Private acts or

conduct may incur liability under § 1983 if the individual is a 'willful participant in joint action with the State or its agents.' *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed. 2d 142 (1970), quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966). Of course, the requisite 'joint participation' envisioned in *Adickes* goes beyond the mere use of the state court system by private litigants in the course of an ordinary lawsuit. As stated by this Court in *Hollis v. Itawamba County Loans*, 657 F.2d 746 (5th Cir. 1981), 'no state action is involved when the state merely opens its tribunals to private litigants.' Id. at 749. Within the context of individual dispute resolution, a private party acts under color of state law only when there is corruption of judicial power by the private litigant. In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), for example, the state court litigants bribed the judge and obtained an injunction which deprived their adversary of property. The private individuals were considered to have acted under color of state law for § 1983 purposes, regardless of the judge's immunity or liability.

. . . . . .

"Even if this Court did read the complaint as alleging illegal joint action between the judge and the defendants, the record is totally devoid of any facts at all to support a finding that the state judge was improperly or maliciously involved in the foreclosure. Any assertion of illegal motive on the part of the judge is purely conclusory, unsupported by any pleaded facts.

"The Earnests also allege that the Lowentritts acted under color of state law in undertaking the foreclosure action and in acquiring the 850 acres by sheriff's sale. The Supreme Court has characterized the private use of state legal procedures for purposes of the Fourteenth Amendment as attributable to the state only in situations where the state has created

a system which allows state officials to attach property on *ex parte* application. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) (state created garnishment procedure); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (execution of a vendor's lien to secure disputed property); *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (state created garnishment procedures); *Lugar v. Edmondson Oil Co.*, —— U.S. ——, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), (state replevin statute). A recent decision of this Court is illustrative. In *Hollis v. Itawamba County Loans, supra,* an automobile buyer who claimed that his car was seized from him by an abuse of the state replevin proceedings was held to have stated a presumptively valid § 1983 claim for damages through improper use of state power. 657 F.2d at 750. In *Hollis,* unlike the situation in the present case, the creditor was acting pursuant to a state statute which permitted pre-judgment seizure of property without benefit of a hearing. It is in these *ex-parte, prejudgment* situations that the courts have found the state is itself participating in the deprivation of property, and the constitutional requirements of due process apply. Private misuse of a state statute alone does not describe conduct that can be attributed to the state. It is the procedural scheme created by the statute that is state action, and therefore subject to constitutional restraints. *Lugar v. Edmondson Oil Co., supra.* The absence of a full adversary adjudication prior to seizure triggers the constitutional due process issue since state officers typically act jointly with a private creditor in securing the property in dispute.

. . . . . .

"Thus, it is not enough that the Lowentritts utilized state court procedures to satisfy a debt owed by Jesse Earnest. Nor can the State of Louisiana be said to have compelled the defendant to bring the foreclosure action. The fact that Louisiana permitted

> the foreclosure and subsequent sale of the Earnest land as the execution of a judgment obtained in the private adversary proceeding is not sufficient to raise the issue of state action. The Lowentritt foreclosure on the mortgage given to him by Jesse Earnest was a purely private dispute, immune from the coverage of § 1983 lacking a showing of further state involvement."

The opinion continues then to discuss the requisites of a conspiracy action under 42 U.S.C. 1985(3), the holding being in substance that the failure to allege or prove any racially-based animus underlying the conspiracy mandates the dismissal of the action.

In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), at pages 189 and 190 of 66 L.Ed.2d, the Court says:

> "As the Court of Appeals correctly understood our cases to hold, to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions. *Adickes v. S.H. Kress & Co.*, 398 US 144, 152, 26 L Ed 2d 142, 90 S Ct 1598 (1979); *United States v. Price*, 383 US 787, 794, 16 L Ed 2d 267, 86 S Ct 1152 (1966). *Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.* But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability." (Emphasis ours).

In *Arsenaux v. Roberts*, 726 F.2d 1022 (5 Cir. 1982), at page 1024, the Court says:

> "A conspiracy cannot be divined from allegations of trial errors, the ex parte amendment of the complaint after improper communications, and the assessment of court costs. To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act. *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979). The conspiracy allegations made by Arsenaux are conclusory, and more than a blanket of accusation is necessary to support a § 1983 claim. *Aldabe v. Aldabe*, 616 F.2d at 1092, *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977). See also *Cole v. Gray*, 638 F.2d 804, 811 (5th Cir.), *cert. denied*, 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981); *Newbold v. United States Postal Service*, 614 F.2d 46, 47 (5th Cir.) (per curiam), *cert. denied*, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d 101 (1980).
>
> . . . . . .
>
> "Arsenaux has failed to state any factual basis to support the charge that his wife's lawyer conspired with the state trial judge. Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss."

In *Fullman v. Graddick*, 739 F.2d 553 (11 Cir. 1984), at pages 556 and 557, the Court says:

> "In civil rights and conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required. In civil rights actions, it has been held that a complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory. See, e.g., *Burnett v. Short*, 441 F.2d 405 (5th Cir. 1971); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970); *Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969). In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed. See *Ostrer v. Aron-*

wald, 567 F.2d 551 (2d Cir. 1977); *United States Ex Rel. Simmons v. Zibilich*, 542 F.2d 259 (5th Cir. 1976); see also *Black v. United States*, 534 F.2d 524 (2d Cir. 1976); *Fine v. City of New York*, 529 F.2d 70 (2d Cir. 1975). A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy. 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 8,17 [5] at 8-180, 181 (2Ed. 1984)."

In *Phillips v. Mashburn*, 746 F.2d 782 (11 Cir. 1984), at page 785, the Court says:

"We note that the district court incorrectly dismissed Phillips' action as an attempt to retry the state lawsuit. Phillips' allegations, if proven, might entitle him to some relief: a state court judge, although immune from damages under section 1983, when acting in conspiracy with private defendants can supply the state action nexus required for a section 1983 suit. *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S.Ct. 183, 186-87, 66 L.Ed.2d 185 (1980).

"Phillips' complaint, however, makes no particularized showing that a conspiracy existed between the defendant lawyers and the judge; it only alleges that the defendants won the lawsuit. Obviously, being on the winning side of a lawsuit does not make a defendant a co-conspirator or a joint actor with the judge who presided over the case. Id., at 28, 101 S.Ct. at 186. We must therefore decide whether the district court erred by dismissing sua sponte an in forma pauperis pro se complaint which alleged a cognizable section 1983 action based on a conspiracy between a state judge and private defendants, but contained inadequate supporting factual averments.

"We hold that the district court properly exercised its discretion in dismissing the complaint pursuant to section 1915(d). The naked assertion of a conspiracy between a state judge and private defendants without supporting operative facts provides an in-

sufficient state action nexus for a section 1983 action. *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983)."

Repeatedly through their complaint petitioners charge in general terms collusion, conspiracy and fraud on the part of respondents. However, construing these allegations as liberally as a pro se complaint is entitled to be construed, we question that the complaint ever gets around to alleging that any act of any judge was the product of judicial corruption or the product of improper agreement with any litigant or its attorney. If the complaint can be so construed, it seems plain that petitioners' allegations are purely conclusory and that no facts are alleged which would warrant such a conclusion. Under the cases cited this leads inevitably to the conclusion that, so far as the respondents other than the State Judges are concerned, there is missing altogether from the complaint the essential element that these respondents acted under color of state law. So far as these respondents are concerned, petitioners' suit was properly dismissed on the pleadings.

VI. Giving the appropriate consideration to this Court's Rule 17, petitioners completely fail to demonstrate the propriety of the writ of certiorari sought.

Petitioners speak of a decision below inconsistent with the usual course of judicial proceedings and sufficient to call for an exercise of this Court's power of supervision. This contention, though, is founded upon petitioners' mistaken assertion that there has been a violation of petitioners' constitutionally or otherwise federally protected rights in

(1) the mistrial declared by Judge Poff, and

(2) the venue rulings attributed to other judges.

To this it is a sufficient reply that petitioners nowhere demonstrate that constitutionally or otherwise federally

protected rights are involved; and, in the absence of this, there is no federal question,—certainly, none of substance.

Petitioners speak then of "obfuscation." Here we find it difficult to grasp just what the petitioners are saying; but apparently petitioners contend that the respondents have confused and beclouded the issues and that the courts below have done likewise. So far as this petitioner, Amarillo National Bank, and its attorneys, R. A. Wilson and D. Barry Stone, are concerned, it should be a sufficient reply that the positions taken find support in the authorities cited and do not fairly lend themselves to the charge of confusing or beclouding the issues. Certainly the opinions below find complete support in the authorities cited.

Petitioners inject the charge that attorney R. A. Wilson has filed false pleadings in the several state court matters. This charge we challenge. The problem is that the charge is completely foreign to the record before the Court and debates in this area lend no aid to the solution of the question here presented, whether there is any justification for the issuance of the writ of certiorari sought.

In addition to what has been said we refer briefly to these further principles:

FIRST: A litigant may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action. *Hagerty v. Succession of Clement*, 749 F.2d 217 (5 Cir. 1984) and cases cited.

SECOND: In a Section 1983 action this Court accords to the prior state court judgments the same preclusive effect that they would have in the state courts. *Migra v. Warren City School Dist. Bd. of Educ.*, — U.S. ——, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)

To the extent that petitioners' complaints are addressed to judgments actually rendered by the judicial defend-

ants, it is significant that there is complete silence in the complaint with respect to any effort on the part of petitioners to exercise the rights of appeal available to them under state law.

Petitioners demonstrate no reason at all why the writ of certiorari sought should be granted.

CONCLUSION

The Respondent, Amarillo National Bank, speaks only for itself and does not assert the right to speak for any other Respondent. However, in asserting its own rights, it must take into account each of the grounds upon which petitioners seek the granting of the writ, even if those grounds relate to other Respondents, and this it has done. This Respondent submits respectfully that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Notice of Appeal From Federal Court, Civil Case

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. CA-2-84-161

JAMES E. AMEND, *et al.*,
Plaintiffs,

v.

H. BRYAN POFF, JR., *et al.*,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that James E. Amend and J. D. Amend, the plaintiffs above named, hereby appeals to the Supreme Court of the United States from the (affirmation by the United States Court of Appeals, Fifth Circuit, of the judgment of the trial court), entered in this action on June 3rd, 1985.

This appeal is taken pursuant to 28 U.S.C. 1253

(Signed) /s/ James E. Amend
JAMES E. AMEND,
PRO, SE

/s/ J. D. Amend
J. D. AMEND, PRO, SE

Appellants,

615 Texas Commerce Bank Building
Amarillo, Texas 79109
(806) 352-7541

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-183

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1985 Term

JAMES E. AMEND and J.D. AMEND,
Petitioners,

v.

H. BRYAN POFF, JR., NAOMI HARNEY, MARVIN MARSHALL, J.E. BLACKBURN, BILL SHEEHAN, AMARILLO NATIONAL BANK, KEITH LINDMARK, DAVID C. MATTKA, D. BARRY STONE, R.A. WILSON, ROBERT L. TEMPLETON, GASSAWAY & GURLEY, NORTH STATE BANK and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

Appeal From a Judgment of
The United States Court of Appeals
For the Fifth Circuit

REPLY OF RESPONDENTS, H. BRYAN POFF, JR. and NAOMI HARNEY TO PETITION FOR WRIT OF CERTIORARI

Stokes & Fields
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Gary W. Barnard
State Bar No. 01758800

BEST AVAILABLE COPY

No. 85-183

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1985 Term

JAMES E. AMEND and J.D. AMEND,
Petitioners,

v.

H. BRYAN POFF, JR., NAOMI HARNEY, MARVIN MARSHALL, J.E. BLACKBURN, BILL SHEEHAN, AMARILLO NATIONAL BANK, KEITH LINDMARK, DAVID C. MATTKA, D. BARRY STONE, R.A. WILSON, ROBERT L. TEMPLETON, GASSAWAY & GURLEY, NORTH STATE BANK and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney for Respondents, H. BRYAN POFF, JR. and NAOMI HARNEY, certifies that the list of persons and parties having an interest in the outcome of this case on Page 48-49 of Amends' Petition for Writ of Certiorari is correct.

STOKES & FIELDS

By: Gary W. Barnard
Gary W. Barnard

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Respondents.

Response to Petitioners' Statement of Jurisdiction

---

1. The Petitioners purportedly rely upon 28 U.S.C. Section 1253 as grounds for jurisdiction in this Court for their Petitioner for Writ of Certiorari. On its face that Statute has no applicability, as it deals with appeals from orders regarding injunctions heard by three member judicial panels. Those facts do not exist in this case.

2. Federal jurisdiction is lacking in this case, because the Petitioners' appeal shows on its face to be a collateral attack upon a ruling by State District Judge H. Bryan Poff, Jr., which granted a mistrial in State District Court. Such collateral attack upon a state district judge's action does not present a matter for Federal review.

3. Petitioners make no effort to ground their Petition for Writ of Certiorari upon any of the considerations governing such review under Rule 17 of the United States Supreme Court Rules.

4. There is no substantial Federal question.

STATEMENT

Respondent H. BRYAN POFF, JR. is the District Judge of the 47th District Court of Potter County, Texas. Respondent NAOMI HARNEY is the District Judge of the 251st District Court, Potter County, Texas. Since the Petition for Writ of Certiorari makes no complaints as to Respondent HARNEY this statement deals with the allegations against Respondent POFF.

In essence, the act by Respondent POFF that is complained of is the granting of a new trial after a jury verdict. A new trial was granted in response to post-trial motions and case authorities questioning the sufficiency of factual evidence supporting jury findings.

The case is still pending on Respondent POFF's docket.

ARGUMENT

Whether or not Federal jurisdiction obtains in this case depends primarily upon whether or not a "substantial Federal question" is presented, either under the United States Constitution or Federal Statute.

No appropriate Federal Statute has been presented by the Petitioners and therefore the question remains whether or not a "substantial Federal question" is presented under the Constitution.

The Petitioners allege violations of their rights under the Fifth, Seventh and Fourteenth Amendments.

Particular emphasis is upon the Seventh Amendment because JUDGE POFF granted a mistrial in a case where the jury had returned what the AMENDS contend was a verdict in their favor for $609,000.00 in damages. That argument is purely frivolous. Since Galloway v.

United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943), the constitutionality of the directed verdict has been unquestionably upheld and since Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935) and Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), judgments n.o.v. have been upheld in appropriate cases without question. New trials granted in the sound discussion of the trial court have always been held constitutional and have been a part of our state and federal practice from the beginning of our jurisprudence. Tarlton v. Exxon, 688 F.2d. 973 (5th Cir. 1982), Spurlin v. General Motors Corporation, 528 F.2d. 612, rehearing denied 531 F.2d. 279 (5th Cir. 1976), and cases cited in both Courts of Appeals cases.

Neither can Petitioners' raise a federal question supporting jursidiction

under the Fifth or Fourteenth Amendments or the underlying Civil Rights Acts 42 U.S.C. Sections 1983 and 1985. There is and could be no allegation or claim that JUDGE POFF was acting outside of his jurisdictional authority when he ordered the mistrial in the AMEND case on trial in his Court. Petitioners claim injury resulting from JUDGE POFF's action in his capacity as Judge of the 47th District Court of Potter County, Texas and while acting in such capacity, JUDGE POFF is absolutely immune from liability and suit in whatever he does. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1972) is perhaps the most cited and the foundation case upholding the immunity of a Judge from suit and liability growing out of any acts within his "judicial jurisdiction". The Pierson case was brought under Title 42 U.S.C. Section 1983 by Plaintiffs who were arrested, tried and

convicted by Judge Spencer under a statute unconstitutional in the manner of its application to the Plaintiffs. In upholding Judge Spencer's absolute immunity from liaiblity for an unconstitutional conviction our Supreme Court said:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled

and fearless decisionmaking, but to intimidation.

> We do not believe that this settled principle of law was abolished by §1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congres meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that congress would have specifically so provided had it wished to abolish the doctrine."

In Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), Judge Stump was sued for erroneously and incorrectly approving the sterilization of a female. In again affirming the absolute immunity from suit of a Judge acting within his judicial jurisdiction, this Court said:

> "The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it

was a "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, supra, at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall, at 351. Later, we held that this doctrine of judicial immunity was applicable in suits under §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, for the legislative record gave no indication the Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .," Bradley, supra, at 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the

> action he took was in error, done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." 13 Wall, at 351." (Emphasis ours)
>
> "Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall, at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit."

The doctrine of judicial immunity prevails even though the judge's actions may have been prompted by corruption although this certainly is not the case here. In Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), a Duvall County Texas District Judge wrongfully signed an injunction order, corruptly

motivated apparently by a bribe. While holding that the action of the Judge was sufficient state involvement to subject his co-conspirators to suit under 42 U.S.C. Section 1983, suit against the Judge under that section was dismissed. This Court held that while a Judge is not immune from criminal prosecution, he is absolutely immune from liability in suits for damages brought against him under 42 U.S.C. Section 1983 based upon acts performed in his judicial capacity.

Petitioners allege no facts amounting to corruption in their suits against these Judges and even if they did the Judges would be immune from suit and liability. McAlester v. Brown, 469 F.2d 1280 (5th Cir., 1972) was cited favorably by this Court in Stump v. Sparkman, supra. McAlester involved the judge who lost his temper and unjustifiably sentenced one to jail to satisfy his personal anger. All

of the considerations applied in McAlester are met in the case at bar. Whatever our Judges are alleged to have done (1) occurred either in the Judge's chambers or in the courtroom, (2) the controversy centered around a case then pending before the Judge, and (3) the acts occurred in the course of the Judge's actual handling of such case pending in his court. There is accordingly no escape from the doctrine of strict immunity in this case.

Even more basically, the AMENDS' Petition in this Court (and their Plaintiffs' Petition in the Trial Court), alleges no facts giving rise to a cause of action against any defendant. All of Petitioners' allegations are mere assumptions and conclusions. Conclusory allegations of denial of due process, malicious motivation and illegal motive when unsupported by pleaded facts are insufficient to create a cause of action under 42

U.S.C. Section 1983 and dismissal of the Complaint will result. Earnest v. Lowenthritt, 690 F.2d. 1198 (5th Cir. 1982).

Most fundamentally, there is no attempt by the AMENDS to support their Petition for Writ of Certiorari by defining any conflict in State or Federal decisions as outlined in Rule 17 of the Supreme Court Rules.

CONCLUSION

As the United States Fifth Circuit Court of Appeals says in this case from page three of their June 3, 1985 Opinion:

> "In this circuit, it is a "well settled rule that a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." Hagerty v. Succession of Clement, 749 F.2d 217, 220 (5th Cir. 1984). Although the complaint could be read as asserting a conspiracy between the judges and the other defendants, see Dennis v. Sparks, 449 U.S. 24 (1980), it alleged no specific facts that might

> establish such a conspiracy, other than the adverse rulings themselves. Absent such specific allegations, a charge of judicial collusion does not state a substantial federal claim. See Arseneaux v. Roberts, 726 F.2d 1022 (5th Cir. 1982); Earnest v. Lowentritt, 690 F.2d 1198 (5th Cir. 1982); Phillips v. Mashburn, 746 F.2d 782 (11th Cir. 1984)."

Certainly where no cause of action can arise against judges acting within their judicial jurisdiction, there can be no "substantial Federal question" to support jurisdiction in this Court a rising from the AMENDS' illfated attempt to state such a cause of action and their Petition for Writ of Certiorari should be denied, for which your Respondents, H. BRYAN POFF, JR. and NAOMI HARNEY, pray.

Respectfully submitted,

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ATTORNEYS FOR
RESPONDENTS, H. BRYAN
POFF, JR. and NAOMI
HARNEY

By: _____
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Bar No. 01758800

CERTIFICATE OF SERVICE

The undersigned attorney for Respondents, H. BRYAN POFF, JR. and NAOMI HARNEY, hereby certifies that true and correct copies of Respondents, POFF and HARNEY, to the AMENDS' Petition for Writ of Certiorari have been forwarded to counsel for each other party separately represented in this proceeding, or if unrepresented, to the party himself, by depositing same in a U.S. Post Office with First Class Postage Pre-Paid, properly addressed to counsel of record or the party at his post office address, all according to the provisions of Rule 28 of the Supreme Court Rules.

_____
Gary W. Barnard

Attorney for
Respondents, H. Bryan
Poff, Jr. and Naomi
Harney

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

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Respondents.

On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENTS GASSAWAY & GURLEY IN OPPOSITION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney for Respondent, GASSAWAY & GURLEY, certifies that the list of persons and parties having an interest in the outcome of this case on Page 48-49 of Amends' Petition for Writ of Certiorari is correct.

GASSAWAY, GURLEY, SHEETS & MITCHELL

By: Jody G. Sheets
Jody G. Sheets

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On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENTS GASSAWAY & GURLEY IN OPPOSITION

I.

OPINIONS BELOW

Neither the opinion of the 5th Circuit nor the opinion of the United States District Court for the Northern District of Texas at Amarillo are reported.

II.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1) to review an order of the Court of Appeals entered on June 3, 1985.

III.

STATUTE INVOLVED

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

IV.

QUESTION PRESENTED FOR REVIEW

Did Petitioners have a property or liberty interest that was protected by the United States Constitution?

V.

STATEMENT OF THE CASE

Although Petitioners' statement of the case is neither complete nor accurate in all respects, sufficient information is presented for the Court to determine the issues before it.

VI.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A. TO THE EXTENT THAT PETITIONERS SEEK RELIEF UNDER FEDERAL LAW, THIS SUIT WAS PROPERLY DISMISSED IN ITS ENTIRETY FOR WANT OF SUBSTANTIAL FEDERAL QUESTION.

"It is axiomatic that in order to be entitled to relief under 42 U.S.C. § 1983, a plaintiff must show that he was deprived of a right secured to him under the Constitution or Federal Law, and that the deprivation occurred under color of State Law." Taylor v. St. Clair, 685 F.2d 982 (5 Cir. 1982).

Excluding the purely conclusory allegations and directing our attention only to the well pleaded facts, if any there be, the Petitioners present neither.

B. PENDENT JURISDICTION WAS LIKEWISE PROPERLY DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

On this point the Courts below properly cite Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Additionally we would cite Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) and Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36

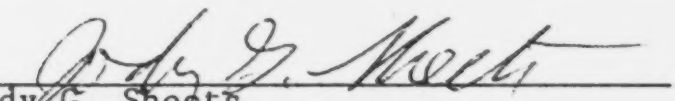
L.Ed.2d 596 (1973). Reference should also be made to the court's discussion in Joiner v. Diamond M Drilling Co., 677 F.2d 1035 (5 Cir. 1982). The Court is there considering ancillary, rather than pendent, jurisdiction; but, as the footnote at page 1042 points out, the Court's reasoning in Gibbs applies with equal force in defining the proper reach of both pendent and ancillary jurisdiction.

CONCLUSION

This is not a case of Constitutional dimensions. This is not a case that raises a substantial federal question. The Supreme Court of the United States was not given jurisdiction for the purpose of affording the losing party a third trial. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GASSAWAY, GURLEY, SHEETS & MITCHELL

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney for Respondents, GASSAWAY & GURLEY, hereby certifies that true and correct copies of the foregoing Reply of Respondent, GASSAWAY & GURLEY, to the AMENDS' Petition for Writ of Certiorari have been forwarded to counsel for each other party separately represented in this proceeding, or if unrepresented, to the party himself, by depositing same in a U.S. Post Office with First Class Postage Pre-Paid, properly addressed to counsel of record or the party at his post office address, all according to the provisions of Rule 28 of the Supreme Court Rules.

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SEP 6 1985
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REPLY BRIEF OF PETITIONERS, JAMES E. AMEND and J. D. AMEND To Respondents Reply to Petitioners' PETITION FOR WRIT OF CERTIORARI

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Petitioners' Brief in Reply

I. Petitioners Reply to Respondents Treatment of the Substantiality of the Federal Question Which was Presented to the Court for Determination.

In replying to the respondents' briefs in opposition, we first consider the fact that the subject briefs definitely ignore the question presented to be reviewed. The respondents have presented some fifty pages of burdensome, irrelevant and immaterial matter for this Court's consideration as they have dome in the lower

courts; as a matter of fact, the Amends have been repeatedly harassed with this obfuscatory procedure for more than nine years.

The respondents have declined to address any of the questions that are, or might be, material to the substantiality of the federal question; they have failed to even so much as mention the question of concern; they only endeavour to change the subject so to speak. In Judge Poff's reply, "the reexamination of facts tried by the jury", as set out by the petitioners, is not addressed at all; the declaration of a mistrial is the sum and substance of the discussion. The act of declaring a mistrial by a judge certainly does not violate constitutional rights pursuant to the Seventh Amendment, however it might very well violate constitutional rights pursuant to the Fifth and Fourteenth Amendments; it has, in fact, denied the Amends "their day in court" for more than four years. The respondents do not discuss this matter

at all.

There is actually no real issue involved in the substantiallity of the federal question for the reason that the controlling facts are such that there is no dispute, and there is only one question which finally must be answered. The United States Court of Appeals For the Fifth Circuit affirmed a decision of a United States District Court to dismiss "Amends' federal claims as "wholly insubstantial" and insufficient to support federal jurisdiction". There is no question other than the substantiallity of the federal question, which is the only question which must finally be answered. The federal question is substantial for the reason that the undisputed facts evidence the violation of Amends' rights guaranteed under the Seventh Amendment to the United States Constitution:

1. The Amends allege that Judge Poff reexamined facts tried by a jury. The defendants do not dispute the allegation, in fact, Defendants R. A. Wilson and R. L. Templeton confirm it in

briefs filed in this Court.

2. The Amends allege that Judge Poff's reexamining facts tried by the jury violate constitutional rights pursuant to the Seventh Amendment to the United States Constitution. This is not disputed by any of the defendants.

3. The Amends allege that violation of rights guaranteed under the United States Constitution, constitutes a substantial federal question. The allegation is disputed by no one.

The above within itself should be sufficient for the disposition of this entire matter. First State Bank of Seminole v. Dillard, Tex Civ. App. 71, S.W. 2d 407, 410- Also, "An issue of law arises when evidence is undisputed and only one conclusion can be drawn there from." Chaison v. Stark, Tex. Civ. App., 29 S.W. 2d 500,503.

II. Petitioners' Reply to Respondents' Discussion of Jurisdictional Grounds for Writ of Certiorari.

We now address Respondents' discussion concerning

the petitioners grounding their request for a writ on 28 U.S.C.S. § 1253. (IV) under (e) of .1. under Rule 21, listing the concise grounds on which the jurisdiction of this court is invoked reads as follows: The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari. We emphasize, (the statutory provision BELIEVED to confer) jurisdiction. the Petitioners certainly believed that they were using concise grounds sufficient to confer this Court's jurisdiction to review the writ or they would not have used it. Now, if the Court deems it essential that another statutouy provision be used, the petitioners will certainly comply as directed by the Court. This would seem to be a very minor technicallity, and for the reaason that pro se pleadings, in suits seeking compensatory damages and injunctive relief are to be judged with liberality, and because the petitioners based their

belief on the following, the obstacle, if there be one, should not be insurmountable.:

> "28 U.S.C.S. § 1253 must be read in connection with provisions of 28 USCS § 1294 that appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From the District Court of the United States to the Court of Appeals for the circuit embracing the district." Longshoremans and Warehouseman's Union v. Ackerman (1948), D.C._(Hawaii) 82_F. Supp._65, reviewed on grounds (CA 9 Hawaii) 197 F2d 860, cert den 342 US 859, 96 L Ed 646, 72 S CT 85."

III. Petitioners' Reply to Respondents' Comments Concerning Review of Writ of Certiorari Under Rule 17.

A. Respondent Poff alleges that he is absolutely immune from liability. In suits seeking Compensatory danages it is essential that liability be established. Under Trust law, a judge, a lawyer or anyone else dealing with fiduciary ties of a Trustee-Beneficiary relationship has made himself liable to the Beneficiary. In this suit it is an undisputed fact that Judge Poff reexamined facts tried by a jury, an act which the Amends allege violated constitutional rights and also

breached fiduciary rights. The Amends can find no law which deals with the situation, and they believe that it is an important question of federal law which has not been settled or reviewed by this Court.

B. Petitioners believe that the affirmation of a decision by a federal court of appeals which the federal district court did not make, and which is inconsistent with the usual course of judicial proceedings is certainly sufficient for the exercise of this Court's supervision.

C. The employment of obfuscation in judicial proceedings is, generally speaking, only a means for accomplishment of unlawful purpose; obfuscation does nothing to further justice. It is time comsuming and it is very expensive. This is a very important question of federal law and its widespread employment by those seeking to undermine the cause of justice warrants settlement in this Court.

IV. Petitioners' Reply to the Non-judicial Defendants Who Responded in Opposition to the Writ of Certiorari.

In the interest of brevity, the only thing that the petitioners will further reply to in the briefs of the non-judicial defendants is R. A. Wilson's comments related to "obfuscation". Mr. Wilson speaks of the petitioners mistaken assertion that there has been a violation of their constitutuionally or otherwise federally protected rights in the mistrial declared by Judge Poff. This statement is simply not true; the petitioners assert that reexamination of facts tried by a jury is the violation. The declaration of a mistrial is what Mr. Wilson attempts to focus attention on and divert it away from the reexamining of facts tried by a jury. Even though the question presented for determination was the substantiallity of federal question, R. A. Wilson's main topic is the mistrial, which he refers to at least 10 times. He

further evidences his obfuscation by stating that petitionres made no effort to exercise the right of appeal available under state law. Mistrials are unappeable. We are only concerned in these proceedings with the substantiallity of federal question; the sole basis of the dismissal and a matter which could not be appealed under state law. Otherwise, the briefs do not seem to comform to the requirements of .6. under Rule 34. The matter as presented by these respondents is burdensom, it is largely irrelevant and immaterial, it is not concise and it is decidedly frivolous. It could very well be disregarded and stricken by the Court pursuant to Rule 34.

CONCLUSION

Petitioners respectfully submit that the Court determine that reexamination of facts tried by a jury, by a member of the judiciary, constitutes a substantial federal question, and that the writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is certified that on September 5, 1985, a true reproduction of the foregoing Reply Brief was forwarded to all the attorneys representing defendants at the addresses of record.

J. D. Amend